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education to student despite the fact that there was no subject of computer education in school- Services of petitioner were not engaged by PTA on account of act if opinion of the education department of not appointed a teacher to impart education to the student in a subject duly introduced in the school- Petitioner has not right to claim grant –In-Aid from court- Because his appointment as Teacher to impart computer education by the PTA of school was testing tortuous an unintended act at the behest of PTA of govt can not be burdened to release the grant in aid((Paras 6, 7, 8). Title: Kulwant Singh vs. State of Himachal Pradesh and others Page-26

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Code of Criminal Procedure, 1973-Section 439- Petitioners seeking regular bail in Case FIR NO. 271 of 2017 P.S Paonta Sahib under sections 147, 149, 332 & 307 and Section 25 Indian Arms Act- Petitioners in judicial custody since July 2017 and case pending for prosecution evidence- Whereas one co-assessed enlarged on bail- Held, that bail petition of petitioner Manjeet Singh was rejected by Hon'ble Supreme Court on the ground that case is at an advance stage of trial- No justifiable or plausible reason exist to enlarge the petitioners on bail at this stage- Petition dismissed. (Paras 7, 14 & 15) Title: Navjot Singh vs. State of Himachal Pradesh Page-34

Code of Criminal Procedure, 1973-Bail-439 Cr.P.C.- Sections 363, 366, 376 IPC- Section 6 POCSO Act- Victim aged 16.5 years – Victim and Bail petitioner known to each other for quite considerable time, meeting each other frequently- She on her volition ,without any external pressure joined the company of bail petitioner as per her statement under section 164 Cr.PC.- Medical officer opined that there was no genital or physical injury and there appears to be no use of force- Challan filled- Nothing remains to be recovered from bail petitioner- There appears no justification to let the bail petitioner incarcerate in jail for an indefinite period during trial. Title: Sanjay Kumar vs. State of Himachal Pradesh Page-107

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Code of Criminal Procedure, 1973- Section 438- Under Section 498-A, 504, 34 IPC and section 66 (E) and 67, IT Act- Relationship of husband and wife is a privileged relation – Institution of marriage inspires trust and confidence which leads to complete surrender of spouses to each other – This relation of mutual trust, faith and confidence creates sense of security – Such feeling inspires openness between husband and wife- Posting and uploading nude photographs of spouse particularly of wife, in public domain amounts to betray the mutual trust and confidence which marital relation implies- It is striping off a woman in public by the husband himself who is not only supposed but duty bound to protect her- It is not only serious but a heinous crime- Its impact on soul, mind and health of the victim is beyond comprehension, attracting provision of 498-A IPC- An act amounting to stripping of a woman in public disentitles a person from anticipatory bail- The section 438 Cr.PC is not framed to benefit such offenders- Particularly a husband who is accused of an offence amounting to stripping off his wife in public- Bail rejected. Title: Abhishek Mangla vs. State of H.P. Page-161

Code of Criminal Procedure, 1973- Under sections 363, 366-A 201 IPC & section 4 &17 POCSO Act- Victim in regular contact with petitioner for last five six months & maximum calls made by victim herself as per call detail reports- In first statement under section 161 & 164 cr.p.c-Victim stated that she had gone to the house of her cousin on her own willingness and she was not kidnapped by anybody and was not subjected to any sexual assault – She refused for her medical examination- Father first lodged missing report- Then on complaint of father, case was registered- Then victim supported the allegation of kidnapping and she was violated in her statements under section 161 & 164 Cr.PC- During medical examination, Medical Officer has not found any physical external or internal injuries on person of victim- Has not given any

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Code of Criminal Procedure, 1973-Section 439 Cr.P.c Under section 20 of ND&PS Act-Commercial quantity of 1.073 kg of cannabis, allegedly recovered from the petitioner-Contraband involved in the case was of commercial quantity, thereby attracting the provision of section 37 of NDPS Act where in for enlargement on bail,besides compliance of section 439 Cr.P .c the twin conditions viz- Existence of reasonable grounds for believing that the accused is not guilty of offence alleged and (ii) He is is not likely to commit any offence while on bail are required to be recorded/ satisfied .It is not very often that satisfaction of these two condition get recorded in case involving commercial quantities of contraband.Title: Kuldeep Singh vs. The State of Himachal Pradesh Page-171

Code of Criminal Procedure, 1950-Anticipatory- bail-section 438 Cr. P.C -under sections 323,363,366,376IPC-PETITIONER-Accused of commission of offences of kidnapping, raping, hurting and stupefying another married lady aged 28 years-apprehending imminent arrest-petitioner has no criminal history

pretrial incarceration needs justification depending upon offences heinous nature – Terms of sentence prescribed in the statue of such a crime- probability of accused fleeing from justice, hampering the investigation, criminal history of accused and doing away with victim and witnesses- The court is under an obligation to maintain a balance between all stakeholders and safeguard the interest of victim, accused,society and state While deciding bail application-courts should discuss evidence relevant only for determing bail- The possibility of the accused influencing course of the investigation, tampering with evidence, intimidating the witnesses and likely hood of fleeing from justice can be taken care of by imposing elaborative and stringent conditions

As per petition-both are adults - Adultery is no more offence because section 497 I P C was struck down by Hon'ble apex court in Joseph shine judgement

The sequence of events as mentioned in F I R reveals that victim is silent of drawing attention of any body through her, sojourn for 12 days-During visiting various places, she would have got enormous opportunities to get rid of petitioner if she was unwilling to travel with him-Narration of events would not justify pre trial incarceration – a case of bail made out. Title: Sandeep Nirala vs. State of Himachal Pradesh Page-221

Code of Criminal Procedure, 1973- Section -173 of Cr.P.C. – Section 420, 34 of IPC- An FIR was registered against the accused persons that dishonest and fraudulent act was committed by them – ACJM(1) Shimla took cognizance and notices issued to the accused persons – Order was challenged before the Hon'ble High Court on the basis that entire transaction was based on oral agreement - Held, that at the time of taking cognizance of offence, it is not necessary for the Magistrate to find out as to whether trial is clearly going to culminate into conviction of accused or not- That Magistrate has only to see whether there in prima facie evidence on record for possibility of commission of offence- Petition dismissed. Title: Kehar Singh Khachi & another vs. State of Himachal Pradesh & another Page-228

Code of Criminal Procedure, 1973:- Section 439 Cr.PC- FIR under Sections 8, 20,25,28,29 & 60 of ND&PS Act, P. S. NCB Chandigarh- Recovery of 8 Kg 750 gms charas and 1.020 kg opium from accused Kuldeep and Hardeep being transported in Mahindra Pik up bearing HP -12-J-4403- Petitioner is receiver of the contraband- Enlargement sought on health grounds and that he (petitioner) is implicated only on the basis of statement under section 67 NDPS Act which cannot be used in trial- Held, that role of petitioner in procuring, trafficking or selling charas/opium was based on prior information, leading to recovery of contraband substantiated by CDR record- Petitioner on regular medication and treatment in Jail- Nature and gravity of offence, impact thereof on society and in view of quantum of contraband recovered, petitioner not entitled for bail- Petition dismissed. (Paras 11,12,15,17,19) Title: Karamvir vs. Narcotic Control Bureau Chandigarh Page-521

Code of Criminal Procedure, 1973:- Section 439 **ND&PS Act**, Section 20- An FIR registered against the petitioner for possessing 1.267 kgs of charas- Petition u/s 439 preferred before Special Judge and Hon'ble High Court and both were dismissed- Similar application filed again on the ground that petitioner suffered from disease Covid-19 who is 58 years of age, now he has recovered but is under trauma and extereme anxiety- It was held that keeping in view his age and condition of petitioner and his family being under stress, Interim bail of two weeks was granted with conditions and on furnishing requisite bail bonds along with surety- Petition disposed of. Title: Roop Singh vs. State of Himachal Pradesh Page-354

Code of Criminal Procedure, 1973- Section 439 Indian Penal Code- Section 377- FIR was registered against the petitioner for commission of offence under section 377 of IPC. Bail petition filed before Ld. Sessions Judge, which was dismissed- Petition filed before the Hon'ble High Court. It was held that court is under obligation to maintain a balance between all stakeholders and safeguard the interest of the victim, accused, society and state. Petition allowed keeping in view the background, family and petitioner being without criminal history subject to furnishing bail bonds and on strict terms and conditions- Petition allowed. Title: Jai Ram vs. State of Himachal Pradesh Page-357

Code of Criminal Procedure, 1973- Section 125- Sections 397/401- Petition under Section 125 Cr.PC filed by respondents allowed by Ld. Session Judge (Family Court) Mandi-Prayer made to set aside and quash order for grant of maintenance- Held, that respondent wife has received sum of Rs. 8 lac towards permanent alimony pursuant to compromise between parties resolving to dissolve marriage by mutual consent- Petition under section 13-B filed by the parties allowed- Order dated 5.7.2019 for grant of maintenance quashed and set aside- Both the petitions disposed off. (Paras 6, 8, 11 & 15). Title: Bhim Sain vs. Anisha and another Page-571

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Code of Civil Procedure, 1908-Order 39 Rules 1 & 2 plaintiff filed a civil suit- Seeking relief of permanent prohibitory injunction – an application seeking interim relief was filed, which was dismissal by the trial court- An appeal was filed which was also dismissed- Held a party seeking relief is not only recorded to establish prima facia case but also irreparably loss and injury which may be caused in case of denial of grant of relief- While deciding balance of convenience, court is remained to weigh protection of plaintiff right- Against need for protection of defendant' right or infringement of right- No perversity in the judgment- And order passed by the Ld, Courtws below-Petition dismissed. Title: Suresh Kumar vs. Pooja Page-673

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Constitution of India, 1950- Article 226- Work charge status conferred on Tejat Ram deceased husband of petitioner, on 1.1.2002- Petitioner has sought writ of mandamus directly, the respondents to grant family pension alongwith all incidental benefits- Held, that it is not established that deceased husband of petitioner completed a period of continuous service on the date of superannuation as a regular employee- The deceased husband of petitioner only entitled to pension and hence petitioner also entitled to only family pension- Petition allowed- Respondents directed to disburse family pension to the petitioner along with other incidental benefits. (Paras 2 & 3) Title: Smt. Satya Devi vs. State of H.P. & others (D.B.) Page-61

Constitution of India, 1950- Article 226- Petitioner appeared as OBC (reserved) candidate in the relevant recruitment process- Allegation that petitioner not treated to fall within OBC category but within general category- Petitioner has challenged the awarding of marks to him within general category and selection of co-respondent No.3 not occurring in the originally drawn merit- Held, that certain candidates belonging to scheduled Tribe and OBC category(ies) who appeared in screening test were shown in general category- However, rectification made subsequently and marks awarded to the candidates in consonance with their applied for categories vis-a-vis advertised post(s) pursuant to direction in CWPOA No. 1110 of 2017- Score sheet called from H.P Public Service Commission shows co-respondent No.3, a candidate from

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Constitution of India, 1950- Article 226-The petitioners took admission in three years course in GNM i.e, General Nursing & Midwifery diploma- in Himalayan school of Nursing. The petitioners handed over their original documents to college at the time of admission at the instance of college on the pretext that document were required for admission and would be given back as and when required by petitioners - the petitioner approached the college for return of documents but of no avail, hence the petition for direction to respondents to return the documents and compensation for illegally retaining their documents – As per reply. the document are not in custody of college having been seized by CBI- As per CBI ,college had retained the original documents at the time of admission for ulterior motive and Seized by CBI- CBI has no objection in case original documents were released to petitioners after retaining photocopies and petitioner shall produce originals as and when required- CBI is directed to return the documents – Petitioners are compensated for their legal expenses to the tune of Rs. 50000/- each towards litigation expenses- petitioners are open to claim compensation before appropriate authority or court in accordance with law. Title: Twinkle Pundir & Ors. vs. State of H.P. & Ors.(D.B.) Page-198

Constitution of India, 1950- Article 226 –Petitioner applied for recruitment of Police Constable as a general category candidate – Respondent No.5 also applied as OBC candidate after availing the benefit of age relaxation- petitioner was placed at Sr. No.1 in the waiting list of male (General) unreserved category whereas respondent No.5 was placed at Sr. No. 14 of the merit list of male general (Unreserved) category – Writ petition filed by the petitioner asserting that he was wrongly kept at Sr. No.1 in the waiting list – The Hon'ble High Court has held that respondent No.5 is required to be shifted from general category to merit list of OBC (Unreserved)- Petition allowed with direction to the respondent to re-draw the merit list.Title: Sh. Rahul Patial vs. State of H.P. & ors.(D.B.) Page-236

Constitution of India, 1950:- Article 226- Petitioner-working as under secretary in H.P vidhan sabha-promoted as deputy secretary-The arrangement was to continue only during leave period of Lal Singh, deputy secretary and shall not confer any right for regularization against post of deputy secretary and for seniority-petitioner assumed the charge of post of deputy secretary and his basic pay was fixed consequent upon promotion though stop gap arrangement-petitioner superannuated from post of deputy secretary –petitioner seeking pension as per post of deputy secretary. It is settled law that pension is not a bounty, but a hard earned property which an employee earns after putting substantive period of his life in the service of the employer. In this case, when the petitioner was actually promoted to the post of Deputy Secretary, may be as a stop gap arrangement, and he continued to serve against the said post in issue independently till the time of his superannuation, then he is entitled to receive pension by fixing the same by taking his last pay drawn to be that against the post of Deputy Secretary (Paras 14, 28, 29). Title: Virender Kumar Guleria vs. State of Himachal Pradesh & others Page-498

Constitution of India, 1950:- Article 226- Petitioner serving as a Principal Government Polytechnic Paonta Sahib, promoted as Joint Director (Technical Education) was not given additional increment on promotion- Petitioner claiming right to have increment on promotion on

the ground of higher responsibilities attached to the post of Joint Director- Held, that condition precedent for getting benefit of increment under F.R. 22 is that promotional post should have higher pays Scale whereas pay scale of Principal (Polytechnic) and Joint Director is the same- O.M dated 7.1.2013 not adopted by State of H.P and its contents not applicable- Petition dismissed- (Paras 8,11,12) Title: Dr. Joginder Singh vs. State of H.P. & another Page-506

Constitution of India, 1950 - Article 226- Writ petition- Petitioner, after having successfully contested the case against original appointee – Instead of respondent No 5,She deserves to be appointed in place of original appointee- Petitioner neither participated in the inquiry proceedings nor did petitioner challenges these proceeding before the Competent Authority- It is not for the court to don the role of fact finding authority in exercise of its extra ordinary jurisdiction under act 226 of the constitution of India- The writ petition of petitioner was decided and Matter was remanded- On remand, the appellate authority directed the competent authority to hold inquiry with respect to the income certificate of respondent No.5 being disputed by petitioner -once the petitioner does not participate in the inquiry proceedings conducted by the fact finding authority and does not even challenge these proceeding then subsequently she can not be heard to complain about income certificate of respondent No.5. Title: Sushma Devi vs. State of Himachal Pradesh & ors. Page-135

Constitution of India, 1950-Article 226–It is settled law that ordinarily, when candidates are considered for promotion by the Departmental Promotion committee, their eligibility is seen as on date when the departmental promotion committee meets- The candidates who stood promoted teachers eligibility test in the year 2013 were senior to petitioner as junior basic teacher- As on the date when the departmental promotion committee met for effecting promotion to post of trained graduate teacher (TGT) Arts all the candidates were possessing the requisite qualification- That being the case, but natural when persons senior to petitioner fulfilling eligibility criteria were available for being promoted to the post of teachers eligibility test, there is no infirmity in the act of respondents of promoting said incumbent-the eligibility of a candidate has to seen as on the date when departmental promotion committee meets unless and until the recruitment and promotion rules specifically provides that a candidate who has passed teachers eligibility test first in time shall have a prior right of consideration ,in absence thereof petitioner who might have passed teachers eligibility test before their seniors can not have a superior claim over their seniors who otherwise fulfilled the eligibility criteria as on the date of meeting of departmental promotion committee. Title: Ramesh Chand vs. State of Himachal Pradesh & others Page-178

Constitution of India, 1950:- Article 226 – Petitioner permanent resident of Bilaspur working as Superintendent Grade-I in the Forest Department was ordered to be transferred from Forest Circle office Bilaspur, to Forest circle office, Hamirpur- Order of transfers was challenged by way of writ petition on the ground that the comprehensive guiding principles- 2013 for regulating the transfer of the State Government employees are not applicable to the petitioner being Class-I officer – Held that the corporation has issued instructions over the issue of near relatives of officers/officials executing works as contractors for the concerned Divisions/ Circles of their respective postings- To avoid conflict of interests held, that public person should have clear and transparent personality- Writ petition disposed of with direction to transfer petition

and 3rd respondent outside their home district.Title:Balbir Singh vs. State of Himachal Pradesh and others (D.B.) Page-246

Constitution of India, 1950- Article 227, Code of Civil Procedure, Order 39 Rule 1 & 2- Plaintiff filed a civil suit for declaration and permanent prohibitory injunction restraining defendant no.1 from raising construction, causing interference & charging the nature of suit land- Application under order 39 Rules 1 &2 CPC was dismissed by the trial court- Order was challenged before District Judge, which was dismissed – Parties feeling aggrieved approached the Hon'ble High Court – It was held that conduct of the party seeking injunction is of utmost importance – Plaintiff did not approach the court with clean hands and was having full knowledge of change in revenue entries – Grant of temporary injunction cannot be claimed as a matter of right by concealing material facts – Order/ judgment was upheld and petition disposed of. Title: Vikram Singh vs. Vinod Kumar Page-410

Constitution of India, 1950- Article 226- Petitioner working as steno-Typist prayed that her entire service w.e.f. 27.2.1987 may be considered for seniority and pension and to grant her pension under old scheme after her superannuation – Held, that the petitioner did not take up the issue of her assignment to DRDA- Continued work till her merger in Rural Development Department – Petition hit by delay and laches as cause of action arose in 1987 and petition was filed after 26 years i.e. in the year 2013- Petition dismissed being hopelessly barred by time. Title: Vijay Kumari vs. State of Himachal Pradesh and others Page-424

Constitution of India, 1950- Article 226 – Petitioner No. 1& 3 regularly working as computer operator and petitioner No. 2 as chowkidar- Claimed their appointment on contract basis whereas respondents claimed their appointment on work order- Hence they have no claim for regularization- Held, that all similarly situate persons should be treated similarly – A particular set of employees were given relief in Veena Kumari vs. HPSEB & anr. CWP No. 6690 of 2010 passed by the Hon'ble High Court on 04.1.2013 all other identically situated persons need to be treated alike otherwise it would amount to discrimination under Article 14 of Constitution of India,. Petition allowed- Direction issued to the respondents to regularize the services of petitioners. Title: Munish Kumar and others vs. Himachal Pradesh State Electricity Board Limited and another Page-431

Constitution of India, 1950-Article 226- The petitioner participated in tendering process and his bid was accepted. Respondents No.3 placed an order for supply of medicines/ drugs etc. petitioner sought extension of time and made two representations but the extension was refused- Petitioner preferred writ of Mandamus before Hon'ble High Court- Held, that the contractual clause deals with detailed analysis- 3 truck locads already supplied by the petitioner but he failed to supply the entire order within in 90 days – It does not amount to automatic recession of contract when petitioner is willing to supply the remaining order and made communication for extension of time- Denial of extension not proper – Petition allowed. Title: M/s Baijnath Pharmaceuticals vs. State of H.P. & others. (D.B.) Page-436

Constitution of India, 1950- Article 226- Petitioner after completing 8 years of service as daily wager has sought conferment of work charge status- Held that in view of CWP No. 2735 of 2010 rendered by the Hon'ble High Court and affirmed up by the Hon'ble Apex Court, the verdict is

binding and conclusive- Petition allowed- respondents directed to confer the work charge status to the petitioner along with all benefits. Title: Satinder Singh vs. State of H.P. & another. (D.B.) Page-441

Constitution of India, 1950- Article 226- Petitioner participated in tender invited for collection of Adda entry fee on lease basis and was declared L-1, deposited Rs. 1, 39, 320/- before R.M HRTC Rampur- agreement was also drawn inter-se the parties- Competent authority rejected the recommendation which declared petitioner as L-1- filed writ petition, feeling aggrieved court proceeded to make judicial review on power of annulling- held that selection committee did not exercise contractual power and cancelled the successful bid without assigning reasons – It was necessary to pass a speaking and well reasoned order, moreover the agreement was also drawn between the parties- Refunding of bid money to the petitioner was unworthy of acceptance- Petition allowed. Title: Shri Mohar Singh Khatri vs. The Managing Director, HRTC & others (D.B.). Page-443

Constitution of India, 1950- Article 226- Petitioner stood retired from service on 31.10.2016, but his pension case was not proceeded by the respondents- Felt aggrieved and filed writ petition- Held, that petitioner rendered service under the respondents on work charge basis and regularized as chowkidar- Verdict recorded in CWP No. 6167 of 2017, titled as Sunkru Ram vs. State of H.P and others decided on 6.3.2013 are attracted and the petition was allowed with direction to process the possession papers, to compute the period of his service in work charge capacity as qualifying period and to grant all retiral benefits to him. Title: Sh. Pratap Singh vs. State of H.P. & others (D.B.) Page-446

Constitution of India, 1950- Article 226- Petitioner completed 10 years of service as daily wager under the respondent but work charge status was not conferred upon him-it was held that petitioner failed to satisfy all the parameters of completion of 240 days of continuous service, Moreover non- continuity and disruption of service is agitable upon the Industrial Tribunal- No merit was found in the petition and it was dismissed. Title: Kushal Chand vs. State of H.P & others (D.B.) Page-448

Constitution of India, 1950- Article 226- Petitioner inducted and joined as Clerks amongst 90% quota reserved for direct recruitment and were regularized. Because aggrieved by entries in tentative seniority list whereas they were placed below the two candidates belonging to the category of 10% promotion from amongst them as incorrect arranging of seniority- Held, that R & P rules empower the vice-Chancellor to make adhoc appointments against any of the posts for particular period which is extendable- The clause in unchallenged- nothing to prove that there was any mala-fide- No merit found and writ petition was dismissed. Title: Ram Chand & Others vs. Himachal Pradesh University and others (D.B.) Page-450

Constitution of India, 1950- Article 226- Both the writ petitioners were working as daily wagers under the respondents, completed the qualifying period of service but not regularized and their services were terminated- Both felt aggrieved and preferred writ –It was observed that the averments are bald and not supported with material , rather it is a case of breach of conditions which will fall under Industrial Disputes Act- Petitioners not enrolled on muster roll and there is non completion of 240 days of continuous service in a year-Both writ petitions

dismissed with direction to exercise the alternated remedy. Title: Bansi Lal vs. State of H.P & others (D.B.) Page-452

Constitution of India, 1950:- Article 226- Three writ petitions filed by the petitioners on the ground that Government is not opening colleges which were announced by previous government during 2017 i.e, Govt. Degree College Jeori, Powabo and Narag- A meeting held under the chairmanship of Hon'ble Chief Minister and it was not considered appropriate to make newly announced colleges functional – Held opening of Govt college is policy decision of the Government having limited scope of judicial review- Interim order vacated and writs disposed of with direction to respondents to take appropriate final decision.Title: Ashok Negi vs. State of Himachal Pradesh & anr.(D.B.) Page-456

Constitution of India, 1950:- Article 226-Petitioner working Technical Assistant in the Department of Industries retired on 31.3.2003- Whether entitled to the increment which fall on 1st of April 2003- Petitioner Krishan Pal Junior Basic Teacher retired on 29.2.2003 and date of annual increment is 1st March of every year- It was held that the status of petitioner on 1st day of next month when they stood retired is that of pensioner, therefore, no increment can be granted in their favour- Petitioner dismissed. Title: Hari Prakash vs. State of Himachal Pradesh & ors. (D.B.) Page-464

Constitution of India, 1950:- Article 226- Himachal Pradesh Cooperative Societies Act, 1968- Sections 93,94- Appeal preferred under Section 93 dismissed by Appellate Authority, vide impugned order dated 30.7.2020- Impugned order challenged by way of writ petition- Held, that once appeal under Section 93 culminates into an order, the State Government has the power of revision under section 94 (1) of 1968 Act and writ petition is premature having preferred without exhausting revisional jurisdiction- Petition dismissed. (Para 4, 5). Title: Veerta Devi and another vs. State of H.P. and others Page- 475

Constitution of India, 1950:- Article 226- Petitioner made representation before the erstwhile Tribunal and respondent was directed to act in accordance with law- The competent authority disposed of the representation with some observations- The Director of Technical Education, Vocational and Industrial Training HP by passing final order has rejected the claim of petitioners- It was held that petitioner has to assail the order before competent forum- Petition disposed of with liberty to file petition for redressal of his grievance.Title: Ashraf Ali vs. Kamlesh Kumar Pant & another Page-474

Constitution of India, 1950:- Article 226- Notification of Police Department, District Kullu, for appointment to 6 posts of constables (Driver) i.e 3 posts for general and one post each for S.C (Ex-Servicemen), ST (Antodaya/IRDP) & OBC (Antodaya/IRDP)- No post under SC (General)- Application of petitioner to consider his candidature for the post of constable (driver) general category as there was no post in SC (General) category which was accepted- District recruitment Committee (DRC)on conclusion of recruitment process selected respondent No.5 to the post of constable (driver) in SC(General) category- Post of constable (driver) in sub category of SC (IRDP) was dereserved and made available for SC (General) category during selection process- Held, that entertainment of application of respondent No.5 during selection process illegal- Post becoming available in residuary SC (General) category was required to be notified again which

was not done- Selection of respondent No.5 to the post of constable (driver) in the category of SC (general) quashed- Petition allowed. (Paras 2,3,20,22, 23). Title: Tarun Kumar vs. The State of H.P. & others. Page-478

Constitution of India, 1950:- Article 226:- Election petition filed by Smt. Radha Devi against elected Pradhan allowed by Appellate Authority- Appeal dismissed by Deputy Commissioner- Writ petition preferred on the ground that election petition was defective and appeal not maintainable- Held, that Election petition not verified at the foot by Election petitioner nor accompanied by an affidavit in support of pleadings as required under Order VI, Rule 15 (4) CPC on prescribed form in Form-43 H.P Panchyati Raj (Election) Rules 1991- Election Petition filed by election petitioner per se defective as purported affidavit sworn in favour of election petitioner pre-dates the election petition- Writ petition allowed- Orders dated 2.3.2019 passed by SDO (Civil) and order dated 9.1.2020 passed by Deputy Commissioner in appeal set aside- Respondent /State directed to allow the petitioner to perform her duties as Pradhan G.P Hinner. (Paras 17, 25, 28). Title: Nisha Thakur vs. Radha Devi and others Page-525

Constitution of India, 1950:- Article 226- Petitioner applied for the post of Drawing Master in respondent department- Appointment offered to private respondent which is assailed – Held, that petitioner and private respondent passed Diploma course from recognized institutes in the same year i.e 2007- Hence, stand of respondent State that private respondent was offered appointment as certificate of vocational course issued to her was earlier in point of time as compared to petitioner not sustainable- Petition disposed of with a direction to concerned Authorities to revisit the respective merit of the Petitioner and private respondent on the strength of documents submitted and appointment be offered to one who is more meritorious. (Paras 14, 17, 18). Title: Anand Swarup vs. State of Himachal Pradesh and others Page-541

Constitution of India, 1950:- Article 226- Petitioner and respondent No.2 applied for the post of Computer Hardware Engineer in respondent department- Petitioner has challenged the selection of respondent No.2 on the ground of insufficient experience- Held, that there is condition precedent in notification dated 21.7.2016 to possess five years experience in computer manufacturing/ maintenance- Recruiting Agency was within its power to relax the condition of age and experience as per R & P Rules which are applicable- Error to quote rules in advertisement can not override the rules- Selection of respondent No.2 being more meritorious and relaxation in her favour not being challenged- No legal basis to quash her appointment – Petition dismissed. (paras 20, 26 & 30). Title: Rahul Verma vs. Himachal Pradesh Board of School Education and others Page-549

Constitution of India, 1950:- Article 226- Inquiry held against petitioner who was serving in Forest Department for dereliction of duties- As per inquiry report Articles of charge not proved- Disciplinary Authority ordered de-novo inquiry which is challenged- Held, that there is no provision in Rule 15 CCS (CCA) Rules 1965 for completely setting aside previous inquiry report except remitting back matter to inquiry Authority- Petition partly allowed and order of Disciplinary Authority for de-novo inquiry set aside with a liberty given to remit matter back to Inquiry Authority for further inquiry. (Paras 15,16,17) Title: Devinder Singh vs. State of Himachal Pradesh Page-565

Constitution of India, 1950:- Article 226- Husband of petitioner regularized as Peon in Forest Department granted work charge status from 1.1.2001 in terms of directions in CWP No. 3266 of 2012 filed by petitioner after his death- Petitioner claiming full arrears of work charge status and family pension- Held, that husband of petitioner remained silent regarding claim of arrears till his death i.e, 18.4.2010, arrears can not be granted till 18.4. 2010- Arrears to be restricted to 3 years prior to filing CWP NO. 3266 of 2012, but calculated for the period 3 years prior to death of husband of petitioner- Claim for arrears of work charge rejected- Further, work charge status followed by regular appointment to be counted as qualifying service for pension and retiral benefits- Petitioner held entitled to family pension being nominee / legal heir of late Dhajju Ram – Petition partly allowed. (Paras 5, 7 & 11) Title: Smt. Mehandi Devi vs. State of H.P.& others Page-584

Constitution of India, 1950:- Article 226- Petitioner regularized as forest worker in the respondent Department- Work charge status approved in favour of petitioner, arrears calculated and released- Claim of the petitioner to recalculate the pensionary benefits after his retirement counting his daily wage service and service rendered on work charge basis- Held, that work charge services rendered by the petitioner to be counted for pension and other retiral benefits- Petition allowed. (Paras 3, 4 & 6) Title: Jia Lal vs. State of H.P. & others Page-589

Constitution of India, 1950:- Article 226 – Petitioner engages as daily wages on muster roll on 7.1.2005- Worked till 30.6.2009- Petitioner being given fixational breaks from time to time on his demand notice- Settlement 4/512(3) of Industrial Disputes Act Arrived between him and employer- Petitioner agreed to work anywhere as per seniority within while jurisdiction of Joginder Nagar forest division as per availability of work- It may be 8 km or more from his permanent residence – Will report for duty on 16.4.2009 as Chauntra- - Reengaged on 16.4.2009 – Worked continually up to 30.6.2009 without any break- Service terminated on 1.7.2009- Petitioner raised Industrial Dispute its conciliation failed- Appropriate Government made land reference to Labour court-cum- Industrial Tribunal- Whether termination of petitioner without complaining performance 25-F, 25-G- 25-G of Industrial dispute is justified- Tribunal decided the reference against the petitioner- Petitioner had done before Hon'ble High Court against the order of tribunal- Held, petitioner after his re-engagement on 16.4.2009 petitioner did not join duty despite notices- The contention record on behalf of petitioner- That petitioner during his employment on workmen was repeated given fictional break with a new to present him to compute 240 days in calendar year so that he can not claim regularization – Held, this place is no relevance in light of terms of reference as reference nowhere suggest that Tribunal was required to go in to the effect of the matter- The Tribunal can not go beyond the terms of reference- Hon'ble He has very limited jurisdiction to- appreciate finding of fact returned by tribunal while exercising writ jurisdiction. Title: Ravi Dass vs. Divisional Forest Officer Page-615

Constitutional of India, 1950:- Article 226 petitioner who have engaged on daily wage basis with effect from 1.1.1993 wee regularized within effect from 5.9.2003, thesis work change service has not been taken in to consideration for the purpose f qualifying service- Held, services rendered in the capacity of work charged employee followed by regular appointment are to be counted as component of qualifying service for the purpose of pension and retiral benefits-

Petition allowed. (Paras 4) Title: Bhola Nand and another vs. The State of H.P. and others Page-701

Constitution of India, 1950:- Article 226, Grants under Grant-In-Aid to Parent-Teacher Association Rules, 2006 discontinued in school located in Municipal Corporation, Municipal Committees and Nagar Panchayats vide communication dated 27.8.2007- Challenged- Held, that petitioner appointed Lecturer by PTA after following due procedure- As per Grant-In-Aid, Rules 2006, grant in released to the PTA who engaged teacher- Clarification made on the basis of grant-in Aid discriminatory and violative of articles 14 & 16 of constitution- Grant-In-Aid, Rules provide no rider that benefit of Grant-in-Aid would not be given to PTA teacher in urban areas- PTA/SMC teacher appointed after communication dated 27.8.2007 in urban areas are in receipt of Grant-In-Aid- Petitioner discriminated without plausible reason- Communication dated 27.8.2007 quashed and set aside- Petition allowed.Title: Joginder Singh vs. The State of Himachal Pradesh and others Page- 709

Constitution of India, 1950:- Article 226- Petitioner granted work charge status w.e,f. 1.1. 2002 having worked in respondent department for requisite period- After release of arrear on account of grant of work charge status, recovery of arrears in excess of three years ordered to be paid to the petitioner sought- Challenged- Held, that Jai Dev Gupta's case is judgment in personam and not judgment in rem and not applicable to present case- No general principal laid to pay arrears for three years prior to filing of the petition- Pursuant to grant of work charge status, arrears of the respondents to recover subsequent action for the respondent to recover the same not legal and justifiable- Instructions of Finance Department to restrict the arrears to three years can not be made applicable- Petition allowed- Respondents directed to release entire amount of arrears as calculated to the petitioner with up to date interest. (Paras 11, 17 & 18).Title: Balak Ram vs. Secretary (Forests) to the Government of Himachal Pradesh and others Page-717

Constitution of India, 1950:- Section 226- Aggrieved by non-selection to the post of TGT[non medical] in the general[BPL] category-petitioner did not file/ prefer any objection to the provisional key answer dated 11.5.2019 and even thereafter to the final key and having failed to do so , it clearly estopped the petitioner from filing the petition that revised key answers particularly at Sr. No.2, 10, 11 & 114 were incorrect- The Petitioner after having taken calculated chance- appeared in the selection process without an demur – No challenge to process/key answer- Relief declined by applying the principles of estopple acquiescence and waiver- The principle apply to the participtionin the selection process and not any illegalitty committed during selection process which is not pleaded / challenged in the case. Title: Bhupinder Singh vs. State of Himachal Pradesh & another (D.B) Page-185

Constitution of India, 1950:- Article 226-The petitioner challenged the policy which debars the petitioner being married daughter of deceased government employee from seeking appointment on compassionate ground- The legality of the compassionate policy in vogue has to be evaluated on the touch stone of constitutionally- Policy is discriminatory to married daughter against spirit of article 15 of constitution of India- The state can not act in a misogynistic way ,carving ways to debar compassionate employment to married daughters and such acts fall within

definition of discrimination based on sex which is against article 15 of constitution of India. Title: Mamta Devi vs. State of Himachal Pradesh & others (D.B.) Page-203

Constitution of India, 1950:- Article 226 – 3 writ petitions disposed of- Petitioners applied for the post of Food Safety Officers and their application were rejected on the ground of non-possessing the required degree- Order challenged on the ground of arbitrariness – It was held that word degree used in Recruitment and Promotion Rules means only a 'Bachelors Degree- None of the petitioners possess a 'Bachelors Degree in the subjects mentioned- All the petitions dismissed.Title: Shri Kamal Kumar Bhardwaj and others vs. Himachal Pradesh Staff Selection Commission and others Page-269

Constitution of India, 1950:- Article 226 – Petitioner Parkash Chand was not considered for promotion to the post of Forest Guard – Petitioner Dharm Singh requested for direction to declare the result of written test and to make appointment of Forest Guard- It is held that petitioner Parkash Chand is simply matriculate and has not acquired 10+2 qualification within 3 years – Held not entitled to be considered for promotion to the post of Forest Guard – Petition of Parkash Chand was dismissed-Petition of Dharam Singh is allowed with direction to the respondents to declare the result. Title: Parkash Chand vs. State of H.P. and others (D.B.) Page-275

Constitution of India, 1950:- Article 226- Petitioners applied for the post of drivers in 4th Battalion Home Guards, Nahan but were not selected- Challenged the selection process on the ground of illegalities – It was held that process of selection can not be challenged by an unsuccessful candidate- Inquiry report was found conducted as per norms. Petition dismissed having no merits. Title: Mukesh Thakur and others vs. State of Himachal Pradesh and others Page-296

Constitution of India, 1950:- Article 226-Petition- For setting aside the appointment of respondent No.4 as instructor in cutting and tailoring on the ground respondent No.4 who was much less qualified or less proficient than petitioner in trade was selected- Held- It is not case of petitioner that respondent No.4 was not qualified to be considered for appointment against post of instructor- Simply petitioner feels that she was more qualified than the selected candidate, same does not confer upon her any right to pray for setting aside of the appointment of selected candidate- Selection of a qualified candidate can not be set at naught by the court unless and until the court is satisfied that the appointment was not on merit but due to some extraneous reasons – Selection committee which was best judge in the cause- and decision of committee has to be respected in the absence of there being any material on record to substantiate that selection was not on merit but on extraneous consideration. Title: Smt. Rekha Kumari Sharma vs. The Principal Secretary (Industries) to the Government of Himachal Pradesh and others. Page-143

Constitution of India, 1950:- Article 226-It is settled law that though right to promotion is not a fundamental right, but right to be considered for promotion is a fundamental right. - the petitioner was duly considered by the Departmental Promotional Committee for promotion and the tone and tenor of the reply of the respondent-department is that the petitioner was also recommended for promotion. In such like scenario, in case, the recommendations of the DPC

are not implemented and in the interregnum, an employee retires, then benefit of the recommendations of the DPC has to be given to such like employee, though may be notionally. This is for the reason that after DPC recommends promotions, then issuance of the order of promotion, not being in the hand of employee, can not act to his deterrent in case he stands superannuated in the meanwhile. The date of superannuation of an employee is well within the knowledge of the employer and therefore, onus falls fairly squarely on the employer to ensure that promotion orders of such like employee who stands recommended for promotion, but is to superannuate in near future are issued without any undue delay. Title: Navender Kumar vs. The H.P. State Forest Corporation & another Page-140

Constitution of India, 1950:- Article 226-Petition- Seeking release of salary- of period when he was shifted and relieved but did not join duty, however, subsequently his transfer order was cancelled- In view of section 47 of the persons with disabilities (Equal opportunities) protection of rights and full participation Act- Held above provision was not applicable- As his grievance was not that the job which was being assigned to him Either of lineman or Assistant line man was not of nature which he could not perform with the kind of disability he was suffering -he was not happy with his transfer - he has not placed anything on record to demonstrate that on account of disability he was not in a position to serve at Moraj- Case being of willful absence from duty no work- No pay principle is attracted. Title: Ranu Ram vs. Himachal Pradesh State Electricity Board Ltd. & others Page-145

Constitution of India, 1950:- Article 226-Writ Petition- challenging the order dated 30.05.2020 relieving petitioner on attaining age of superannuation in view of order dated 25.3.2020 of Government under H P epidemic Disease (Covid-19) Regulations 2020 deferring and extending the age of superannuation of all Medical officers retiring on 31.3.2020, 30.4.2020 and 31.5.2020 up to 30.6.2020- Held- When state in its wisdom had defered the age of superannuation of all para medical staff up to 30.6.2020 then up to 31.8.2020. It was not open to state to discriminate and adopt the policy of pick and chooses while giving extension to paraz medical staff. Title: Man Dass vs. State of Himachal Pradesh and others Page-148

Constitution of India, 1950:- Article 226- Petitioner working as Patwari prayed for grant of pay band of Rs. 10300-34800 + 3200 grade pay to him from the date of pay scale stood reviewed vide notification dated 4.10.2012 by the Finance Department along with benefits- It was held that due to arbitrary approach, petitioner was denied for required pay scale which was granted to similarly situated persons - He does not fall in the category of Patwari Technician as his services stood regularized – There can not be any distinction on the ground that regularization in terms of policy framed by Government can not be equated with Patwaris, who were appointed in terms of Recruitment and Promotion Rules – Petition allowed. Title: Hem Raj vs. The State of H.P. and others Page-305

Constitution of India, 1950:- Article 226- Petitioners after completing the requisite qualifying period as daily wagers were conferred the status of regular employees but were dis- regularized in the year 2013- Challenged the recruitment and Promotion Rules, Clause 10 & 11 – It was held that seniority is relevant parameters for valid induction into regular service for eligible candidates along with 50% quota- Benefit of regularization and grant of seniority to those who were senior to petitioner was found valid- Order of demotion of petitioners was valid – Writ

petition was found without merit, dismissed. Title: Jarnail Singh & others vs. State of H.P. & others Page-341

Constitution of India, 1950:- Article 226- Petitioner was minor when his predecessor in interest has died, who was Forest Guard- On attaining majority, he applied for his appointment on compassionate ground which was found with several shortcomings – Writ petition preferred- It was held that in the policy of government welfare measures have been provided to ascertain the financial position of families of govt, servants who die in harness – Keeping in view the above, the petitioner was not found entitled for such appointment – Grand mother of petitioner receiving family pension-Petition dismissed having no merit. Title: Ankit vs. State of H.P. & others (D.B.) Page-344

Constitution of India, 1950:- Article 226 – Petitioner applied for physical education teacher – Respondents altered answer of three questions in revised key and scored one mark less from the last selected candidate - aggrieved by the conduct of respondent preferred writ petition. It was held that examining authority should give opportunity before issuing final merit or final answer key to the candidates whose correct answers are likely to be adversely effected on the basis of acceptance of objections raised by other candidates- directions issued for future and petitioner was awarded cost of Rs. 5000/- . Title: Anshul Guleria vs. State of Himachal Pradesh and others Page-363

Constitution of India, 1950:- Article 226- Petition challenging the termination order- Held, though the engagement of the petitioner was on temporary basis yet his services could not have been terminated on the basis of verbal directions given by Deputy Commissioner Kullu, In case, services of the petitioner were no more required for only cogent reason then termination ---to have been justified by passing a recorded order after--- the petitioner. Title: Ajay Singh vs. Deputy Commissioner-cum-Chairman Local Area Development Committee & others Page-608

Constitution of India, 1950:- Article 226- Petitioner-sportsman-passed senior secondary examination in commerce in 2000-B. com in 2003-M A economics in the year 2006 –completed J B T on 2.11.2011- on 12.09.2011 state advertised 1308 posts of J B T- eligibility criteria qualifying marks in TET 60%-before petition –passed TET 56% and during petition passed T E T by securing marks 91/150 in year 2014- 3% posts reserved for outstanding and distinguished sportsman for employment in govt, board/ corporation/university. Petitioner is claiming her appointment against the posts reserved for outstanding sports persons on the basis of criteria provided in category No. IV under sub-clause V, which provides that an outstanding sports person having at least three times participation in 'National Championship' and 'Senior National Championship' shall be eligible to be considered under quota for such sportsmen. Petitioner is claiming her eligibility and right on the basis of her participation in 31st Senior (Women) National Handball Championship held in Guwahati (Assam) w.e.f. 11th February to 16th February, 2003, 29th Senior (Women) National Handball Championship held in Chandigarh (U.T.) w.e.f. 13th February to 18th February, 2001 and 13th Sub-Junior National Handball Championship Boys and Girls (under 15 years) held in Jaisalmer (Rajasthan) w.e.f. 3rd to 7th November, 1996 as evidence from certificates issued by the concerned organizations placed on record as Annexure P-4 (Colly.). The criteria provides that sports person should have three times participation in National Championship(s) and Senior National Championship(s). It

does not preclude Sub-Junior National Championship. As a matter of fact, "National Championship" includes all kinds of National Championships unless excluded specifically.

In view of aforesaid interpretation of Rules which is coming out of the criteria notified by the Government, petitioner is definitely falling in the category IV, sub category V of outstanding sportsmen who are eligible to be considered against the post reserved for outstanding sports person. Therefore, non-inclusion of the name of petitioner in the list of outstanding sports person eligible to be sponsored and considered for employment under the quota reserved for outstanding sports person as unreasonable, irrational and arbitrary . Title: Pooja Sharma vs. State of H.P and others Page-628

Constitution of India, 1950:- Article 226- The petitioner- Engaged as JBT teacher on lecture basis-Remained absent willfully or intentionally from duty-His service were terminates Ld. Administrative Tribunal set order the termination order- To consider the petitioner for appointment in terms of his qualification and experience- In any institute under the charges-Ld. Tribunal did not hold petitioner entitled for ----- Petitioner was given appointment-Petitioner superannuated- His service tendered before termination not taken into consideration for clarity petitioner- Order/ judgment of tribunal suggest that petitioner not entitle to --- wages but claim of petitioner count has service render before terminate while calculation, his entire service for determine- Question--- initial minimum educational qualification provisional for the different posts is undoubtedly a factor to be reckoned with --- Title: Raj Kumar vs. State of H.P. & Others Page-610

Constitution of India, 1950:- Article 226-Petitioner initially appointed as Chowkidar on Daily wage basis on February, 2004- Continuing working without any break with 240 days in every calendar year- Petitioner not being regularized despite policy to requisite the service of daily wage employees after completion of 8 years- Held, petitioner be given work charge status from the date he had completed 8 years of continue service- Thereafter regularize his services in terms of policy framed by Court alongwith compensation benefits. Title: Gurbachan Singh vs. Resident Commissioner & Others Page-591

Constitution of India, 1950:- Article 226-Petitioner engaged as Beldar as rendered continuously his services in Herbal garden- His service illegally let trenched – On Reference under section 10(10 of Industrial Dispute Act- Ld. Labour Court held that act of respondent giving fictional break to workmen is illegal and against statue- Petitioner shall be entitled to continuity of service from the date of his engagement- Award ground of delay- Before these judgment- Petitioner stands regularized but not from due date- Claim of petitioner he should have been regularized when he completed 8 years of length service-Held, Once tribunal held him entitled to continuity in service from the date of his initial appointment – He was entitled for regularized on completion of 8 years regular service- The case of petitioner could not be considered in light of clarification /opinion if any issued by elite of finance that there is no provision for regularize from back date. Title: Baldev Raj vs. The State of H.P. & others Page-598

Constitution of India, 1950:- Article 226- The petitioner engaged as a beldar in the year 1990 – his services were disengaged in the year 1998—petitioner raised industrial dispute in the year 2010—rejected by government on ground of delay and latches in the year 2011—the petitioner filed c w p where by direction was issued if employer required additional man power to

consider the case of petitioner—order rejecting the dispute raised by the petitioner was not set aside ---the petitioner filed representation to department for implementation of judgment – department invited application for posts of junior tea mates but petitioner was not given any preference--- the petitioner again approached hononrable high court the petition was withdrawn—thereafter order dated 3.12..2018 of deputy labour commissioner *was challenged where it was held that dispute raised by petitioner* was stale –no fault can be found with order declining to refer dispute raised by petitioner to ld labour court as service terminated in 1998 -- impugned order passed on 3.12.18—initial delay in raising industrial dispute was on part of petitioner who raised dispute with. Title: Yadav Singh vs. H.P. State Electricity Board Ltd. & another Page-624

Constitution of India, 1950:- Article 226- Ground floor raised by the petitioner in the year 1990- Three storied building raised on its back side in 2009- Electricity connection already issued in ground floor in 1997- Area not within the domain of Town or Country Planning at the time of raising construction --- of petitioner that Electricity connection for new construction wrongly denied for want of additional storey, beyond three stories from competent authority- Held, that writ jurisdiction can be exercised for gross branches despite of remedy available to the petitioner to approach National Consumer Dispute Redressal forum against lower verdicts- Respondents failed to contend vis-a-vis complete prohibition against raising of a four storeyed construction in relevant area- Respondent fail to establish that relevant area falls within boundary of Town and Country Planning- Gross misapplication of notification dated 30.5.2012, which is not attracted- Petition allowed- Respondents directed to purvey the desired electricity connection to the petitioner's building. (Paras 5, 6) Title: Bal Mukund Kashyap vs. State of H.P. & others Page- 724

Constitution of India, 1950:- Article 226- Order passed by Ld. erstwhile H .P State Administrative Tribunal in both the writs quashing termination of Dr. Sanjeev Mahajan directing State of H.P. to re-instate him in service from 8/5/2006- Challenged- Held, that services of Dr. Sanjeev Mahajan governed by CCS & CCA Rules- Incumbent upon respondent to hold an inquiry for alleged commission of purported misconduct or even heinous crime- Criminal Court exonerated Dr. Sanjeev Mahajan from charges- CWP filed by State of H.P. dismissed whereas CWP No. 3471 of 2020 filed by Dr. Sanjeev Mahajan allowed- Sentence occuring in Paragraph w- 9 in order of erstwhile H.P. State Administrative Tribunal quashed. (Paras 3, 4 & 5) Title: State of H.P. vs. Dr. Sanjeev Mahajan (D.B) Page-726

Constitution of India, 1950:- Article 226- Petition transferred and posted as Deputy Director (Animal Husbandry and Breeding) to District Kinnuar- Challenged- Held, that petition has less than five years to superannuate- Execute ousted to exercise power to request the petitioner in tribal area on promotion- Clause 1201 of relevant policy subject to exception- Even respondent No.3 accorded willingness to be posted in place of petitioner- Transfer taking place in the relevant banned phase without necessity- Petition allowed – Impugned order quashed and set aside- Respondents directed to corridor co-respondent No.3 to be posted as Deputy Director, Animal Health/ Breeding Kinnaur in place of Petitioner. (Paras 4, 5) Title: Dr. Rajesh Singh vs. State of H.P. & others (D.B.) Page-729

Constitution of India, 1950:- Article 227, Code of Civil Procedure, order 39 Rules 1 & 2- Plaintiff- Wife claiming suit land to be ancestral property owned and possessed by defendant- Humble, filed suit for declaration and permanent injunction- Claim for charge to be created over suit land for maintenance- Application for interim injunction to restrain the defendant from alienating, transferring, certify charge over suit land dismissed by courts below – Challenged- Held, that no order awarding maintenance placed on record- Charge as yet not created over suit land towards maintenance of the plaintiff- Plaintiff has right to take recourse to legal remedies in case of alliterative of ancestral property by Kartar without legal necessity- No interference called for in the concurrent orders passed by Ld. Court below- Petition dismissed. (Para 5) Title: Kubja Devi vs. Chhape Ram Page-732

Constitution of India, 1950:- Article- Petitioners appeared in the first semester examinations held in January- February 2020, the result of which was not announced- Examination of second Semester not held in time by University- Petitioner seeking quashing of date sheet issued on 18.9.2020 for conducting B.ed second semester examination and direction to respondent university to declare the result of first semester of B.ed promote petitioners to third semester without conducting examination of second semester- Held, that UGC has not restricted that right of respondent university to hold semester examination beyond 30.9.2020- Restriction imposed due to lockdown on account of Covid-19 Pandemic gradually lifted and examination can be held by observing standard operating procedure issued by government- Respondent university submitted that result of second semester will have no impact on the admission of petitioner to third semester- Petitioner can not be promoted to next semester without conducting examination of B.ed second semester- Entire process of hold examination cant be halted- Petition dismissed. (Para 5) Title: Himani Verma and others vs. Himachal Pradesh University (D.B.) Page-737

Constitution of India, 1950:- Article 226- Petitioner worked as Clerk on muster roll daily wage basis on compassionate ground on after after dealt of her /husband respondent- Corporation- Later, joined as Clerk in respondent No.2 department and permanently absorbed there- Prayer to include the duration of period rendered by her husband in the respondents corporation in her service length for seniority pension or other benefits- Held, that there is /are no law/ instructions which provide for counting of length of service of deceased employee for grant of service benefits etc to dependent appointed on compassionate grounds- Compassionate appointment offered to the dependent ---- be said to be continuation of service rather same is to be considered as a new appointment- Petition dismissed. (Paras 3, 4 & 5) Title: Uma Kanwar vs. State of H.P. and Ors. Page-741

Constitution of India, 1950:- Article 226- Petitioners seeking mandamus qua the respondents directly them to declare Dharampur road to avail plying of vehicle enabling the residents to avail the facility of road- Held, that access of road is inbuilt component of constitutionally guaranteed right to life vis-a-vis resident of hilly area- insistence of compliance by the respondents from the petitioner had other land owners to execute the gift deed of land for construction of road breaches constitutional right guaranteed by article 300-A and article 31 of constitutional- Compensation can be awarded to the landowners whose land about the road- Petition allowed- Respondents directed to provide facility of Dharampur- Rajpura road to the petitioner and other residents and its ----- be ensured with 6 months- Respondents also directed to initiate statutory

mechanism for granting compensation to the landowners whos eland about the road or who omit to execute gift deeds of their land. (Paras 3, 4, 5 & 6). Title: Om Parkash & another vs. State of H.P. & others (D.B.) Page-744

Constitution of India, 1950:- Article 226- Petitioner no 1- since birth residing in village and post office Nerwa district Shimla, completed education in state of H. P. petitioners no 2 and 3, his sons residing with him since birth on above address-petitioner no 1 applied for bonafide himachali certificates of his sons petitioners 2 and 3- application rejected - petitioner filed present writ petition for issuance of directions to state to issue bonafide himachali certificates in favour of petitioners no 2 and 3

As per reply- applications were rejected –as certificates of concerned panchayats not attached-bonafide himachali certificates issued during pendency of petition - writ of mandamus issued to additional secretary revenue to issue appropriate direction to all concerned that if applicant produces any of prescribed documents that will be sufficient material proof for issuance of certificate Title: Ashwani Kumar & others vs. The State of Himachal Pradesh & others (D.B.) Page-747

Constitution of India, 1950:- Section 8 and Section 5 of Arbitration and Conciliation Act **–** Article 227 – The petition challenging the order dt 09.01.2017 passed by ld civil judge allowing the application under section 8 read with section 5 of Arbitration and conciliation Act and holding civil suit filed by petitioner not maintainable. The petitioner filed a civil suit for declaration ,permanent and mandatory injunction and damages - defendant financed amount to petitioner for purchase of vehicle- on default of payment of installments –defendant forcibly took possession of vehicle-petitioner filed civil suit alleging snatching of vehicle as illegal and void-parties at the time of financing the vehicle entered into an agreement providing for settlement of disputes by arbitration in accordance with Act in clause-29 -HELD-In the instant case ,allegations of fraud have not been specifically raised in the civil suit. In fact the petitioner had himself relied on the agreement dated 24.3.2012 to factually assert regular payments of loan installments till April 2016 in lieu of loan advanced by the respondents under the agreement. Whether in such circumstances he can even take the plea of fraud is questionable. Nonetheless the plea taken by him in the present petition is not such which will come in the way of enforcement of Clause-29 of the agreement- the civil suit filed by the petitioner was not maintainable. Title: Satishwar Sharma vs. Cholamandalam Investment and Finance Company Ltd. & anr. Page-755

Constitution of India, 1950:- Article 226-Petitions preferred by employees of respondent-H. P state co-operative bank for omissions and commissions on the part of registrar co operative societies with respect to his statutory duty assigned under rule 56 of H .P co operative societies rules 1971 framed under the Act- petitioners have approached the Court, seeking direction to the respondent, i.e. State of Himachal Pradesh through Secretary (Cooperation), and Registrar of the Cooperative Societies to consider their case for promotion to the post of Assistant Manager (Grade-III) from the post of Executive Assistant, from the date of acquiring diploma, i.e. Higher Diploma Programme in Cooperative Management.

HELD - a writ petition against a Society may or may not be maintainable, depending upon facts and circumstances of the case, however, undoubtedly a writ petition is maintainable

against the orders passed by the Registrar with respect to functioning of the Society, exercising statutory powers under the Act or Rules framed thereunder.
Omission on the part of Registrar, to subscribe just and fair procedure to regulate sponsorship of employees of the Bank for Diploma/Certificate course in order of seniority, is a failure to perform statutory duty cast upon him under Statutory Rules 1971. And direction is issued to subscribe just and fair procedure. Title: Kehar Singh & others vs. State of Himachal Pradesh & others Page-763

Code of Criminal Procedure, 1973:- Section 439-under section 302,307,147,148,149 I P C and sections 25 and 29 Arms Act. The accused has a right to maintain successive bail petitions under changed circumstances- the change in circumstances must be substantial having direct and consequential impact on the previous decision, whereby the bail was denied, the changes in the circumstances must not be trivial or cosmetic having no significance of little or no consequence- It is also well settled that without substantial change in the circumstances, subsequent bail petition would be merely review sought to the earlier petition, which was dismissed and such review is not permissible under the Law- it is the duty of the court to consider all the reasons and grounds whereupon the earlier bail petition was rejected and what are the fresh grounds worth consideration ultimately warranting evaluation of fresh bail petition and leading the court to take a divergent view from that of the earlier view rejecting the petition- There must be change in fact ,situation or in law compelling the court to take different view.Title: Rahul Malik vs. State of Himachal Pradesh Page-151

Code of Criminal Procedure, 1973:- Section 438 –Anticipatory Bail - -under 21 and 27A N D P S Act- Petitioner apprehending attest – For purchasing 14.20 gm of heroin with co-accused who was arrested for possessing the same- The quantity of substance seized is not commercial quantity- rigor of section 37 is not applicable-the bail application is on different parameters and similar to bail petition under regular statues - ---pretrial incarceration needs justification depending upon offences heinous nature – Terms of sentence prescribed in the statue of such a crime- probability of accused fleeing from justice, hampering the investigation, criminal history of accused and doing away with victim and witnesses- The court is under an obligation to maintain a balance between all stakeholders and safeguard the interest of victim, accused,society and state While deciding bail application- courts should discuss evidence relevant only for determing bail- The possibility of the accused influencing course of the investigation, tampering with evidence, intimidating the witnesses and likely hood of fleeing from justice can be taken care of by imposing elaborative and stringent conditions – Bail granted. Title: Vaibhav Sharma vs. State of Himachal Pradesh Page-156

Code of Criminal Procedure, 1973:- The petition-seeking direction to state to ensure proper investigation, to lodge F I R under the relevant provisions of I P C relating to the outraging of the modesty and chasity of a woman, sexual assault on a woman, disrobing a woman ,attempt to commit rape on a woman alongwith offences as prescribed in Scheduled castes and scheduled tribes[prevention of atrocities] Act
It is by now well settled that if a person has grievance that FIR has not been registered by the police or having been registered, proper investigation has not been done, then the remedy of the aggrieved person is not to come to the High Court under Article 226 of the Constitution of

India, but to approach the Magistrate concerned under Section 156(3) Cr.P.C. Title: Preeti Devi vs. State of Himachal Pradesh and others (D.B.) Page-216

'E'

Employees Compensation Act, 1923:- Appeal under section 30 of Act- Validity of driving licence- Information recovered under RTI Act from District Transport Officer- --- No record has been found in respect of driving licence- This report can not be construed to be proof of fact that driving licence was not a valid or was a fake licence – The person to whom information was supplied does not enter into witness box- What information was sought by him from office of PIO- DTO is not on record- Simply because it was not expressly mentioned in trespasses that owner of vehicle had engaged the deceased as his driver after verifying his licence does not mean that it has to be assumed against either the claimed or owner of vehicle- The contents of response to claim petitioner how to be continued harmonious with contents of clean petition itself- There is averment in the affidavit of owner that he had checked the driving licence and same was found valid- There was no cross examination on the – insurance company- It can not be held that ld---relied upon evidence contrary to pleading. Title: Oriental Insurance Company Limited vs. Prem Kumar & others Page-602

'I'

Indian Penal Code, 1860:- Sections 302 & 201- Appellant convicted and sentenced for the commission of offence under section 302 & 201- Penal Code by trial court for committing murder of his wife- Judgment of conviction and sentence challenged- Held, that cause of death of deceased due to poisoning established from FSL report- Occurrence of bluish/bruises marks on the neck of deceased proved which are not explained by the accused- Overdose of prescribed medicine, Oprex-5, not proved to be cause of death- Act of appellant in applying force on the neck of the deceased and administering lethal drugs to her proved from evidence resulting in her death- Impugned judgment of conviction and sentence maintained and affirmed- Appeal dismissed. (Paras 6, 7, 8 & 9). Title: Balwinder Singh vs. State of H.P. (D.B.) Page –54

Indian Penal Code, 1860:- Regular bail- Under section 376, 506, IPC- Section 4 POCSO Act- The purpose of sections 207 Cr.p c and subsequent supply of evidence to accused is to enable him to base his bail petition and Other such documents. Hon'ble Court accepted the prayer of Ld. Advocate General as genuine bonafide and Practical- that if documents are filed with petition- it will lend assurance about its correctness and in case of any tempering accountability can be fixed – It will offered opportunity to state to counter such documents in case of any lapse. Title: Rajesh @ Surya vs. State of Himachal Pradesh Page-98

Indian Penal Code, 1860:- Section 306 IPC- Petitioner-daughter-in law of deceased lodged complaint against deceased and his family as a consequences of which deceased was under great mental pressure. Petitioner started residing separately on account of certain difference with her husband and his family members. Petitioner was not ready to settle her dispute amicably with her husband and his family member- her attitude can not be construed to be instigation- Petitioner being Aggrieved if any, on account of mental harassment and Cruelty is well within right to approach police or any court of law – That could not be reason for deceased to commit suicide. (Para 5).

Bail:- One is deemed to be innocent – till the time his /her guilt is proved in accordance with law- there appears no justification to curtail the freedom of bail petitioner indefinitely during trial especially-when nothing remains to be recovered from them (para 6) Title: Binder Singh vs. State of Himachal Pradesh Page-100

Indian Penal Code, 1860:– Section 376 (2) and 506, Section 4 of POCSO Act – Minor prosecutrix while returning home was taken by the accused, being her uncle committed forcible sexual intercourse and threatened with dire consequence- accused was convicted by the Trial court – Preferred criminal appeal – Defence taken that sexual encounters between accused and prosecutrix were consensual and minority of prosecutrix challenged- Held, prosecutrix was minor and her consent is immaterial- source of birth certificate is valid if procued from govt records issued by authorized govt official while discharging his public duties – By Municipal Authorities – Or by the school leaving certificate if accompanied by all the relevant documents – In absence of above the court may rely upon ossification age determination – Appeal dismissed.Title: Guddu Ram vs. State of H.P. (D.B.) Page-250

Indian Penal Code, 1860: – Section 376(2) (f)(n) – Section 6 of POCSO Act – Complaint made by the father of the victim as she was found pregnant during medical examination conducted by private practitioners, it was disclosed by the victim that she was subjected to repeated forcible sexual intercourse by the accused and was criminally intimidated – Trial court convicted the accused - Appeal preferred before the Hon'ble High Court- It was held that the scientific evidence, report of FSL established that the baby of minor victim belongs to accused –Held, that birth certificate of minor victim issued by Secretary, Gram Panchayat concerned not rebutted – Presumption of truth attached to the section u/s 35 of Indian Evidence Act establishing minority of victim at the time of commission of offence – No evidence of consensual act as victim is minor - case stood proved and accused rightly convicted – Appeal dismissed.Title: Sumit Sharma vs. State of H.P. (D.B.) Page-266

Indian Penal Code, 1860:– Sections 147, 148 302 read with section 149 – Both the deceased with their friends on Holi festival assembled in a fields, saw the accused persons rubbing cannabis plants on their hands, the act was protested – After some time all the accused came with Darats and Dandas , inflicted blows and fled away. Two injured persons Rinku and Ashwani died – Trial court convicted all the accused persons – Order of conviction challenged – It was held that oral, documentary and scientific evidence is in favour of prosecution –Recovery of weapons of offence duly stood proved, evidence of witnesses found reliable and corroborative – The judgment of trial court found based on true appreciation of evidence – Appeal dismissed. Title: Panch Ram & others vs. State of H.P. (D.B.) Page-312

It is not open for the court to have its own appraisal and to independently interpret the terms of the tender document by substituting the appraisal and Interpretation of the expert committee more so when such interpretation has not been shown to be incorrect.Title: P.L. Sharma vs. State of Himachal Pradesh and others Page- 114

'M'

Motor Vehicle Accident Tribunal:- Motor Vehicles Act – Sections 173 & 166- Deceased was doing ITI in Motor Mechanic, his income was assessed at Rs. 6000/- p.m. The claims tribunals awarded Rs. 10,06,000/- compensation award was challenged – Held, that deceased was not in regular employment, only 40% addition on account of future prospects was allowed instead of 50%- Award modified accordingly. Title: National Insurance Company Ltd. vs. Banta Singh and others Page-283

Motor Vehicles Act, 1988:- Section 173, 166 - Petitioner working as coolie suffered injuries in an accident – Tribunal awarded compensation of Rs. 49,14,400/- along with 9% interest p.a.- Award challenged- It was held that claimant was not a gratuitous passenger, but was helper in the offending vehicle- He became 100% disabled permanently on account of injuries suffered – Award amount modified and claim of Rs. 62,40,160/- was awarded along with interest @ 9% p.a – Petition disposed of. Title: Shriram General Insurance Co. Ltd. Gutkar vs. Deep Kumar and another Page-368

Motor Vehicles Act, 1988:- Section 173, 166 – Claimant suffered injuries when the vehicle in which he was travelling, met with an accident on the back for Delhi and was 40% permanent disable – Tribunal awarded claim of Rs. 9,23,126 along with interest @ 7% p.a – award was challenged – It was held that minimum wages of unskilled worker was wrongly assessed as Rs. 7000/- by the Tribunal in place of Rs. 3000/- Amount of award modified and reduced to 7,28,646/- along with same rate of interest, claimant was also awarded 40% increase on account of loss of future prospects- Appeal disposed of. Title: IFFCO TOKIO General Insurance Company Limited vs. Anil Kumar and others Page-378

Motor Vehicles Act, 1988:- Section 173- 166- Claimant suffered injuries on account of accident which occurred while he was coming back from Delhi and has suffered 70% permanent disability- Tribunal awarded claim of Rs. 12,69,250/- along with interest @ 7% p.a- award was challenged- It was observed by the Hon'ble High Court that minimum wages of unskilled worker was wrongly assesed as Rs. 7000/- by the tribunal in place of Rs. 3000/- p.m. Claimant was also found entitled for 40% increase on account of future prospects- Award modified and claim of Rs. 9,92,250/- along with 7% rate of interest per annum was awarded- Appeal disposed of. Title: IFFCO TOKIO General Insurance Company Limited vs. Netar Singh and others Page-400

Motor Vehicle Act, 1988- Section 166- No specific evidence regarding income of deceased- His monthly income assessed taking in to consideration and his wages present in the State of H.P a the relevant time- Instead of Addition 50% as held by the tribunal only addition of 40% would be made to his established income if person is self employed and age is less than 40 years while assessing less of dependency – Award modified. Title: ICICI Lombard General Insurance Company Limited vs. Smt. Indira Devi and others Page-665

Motor Vehicle Act, 1988- Section 166- Claimant had sustained 30% permanent disability- Ld. Tribunal below awarded compensation to the time of Rs. 9,65000 alongwith interest at the rate of 7% p.a- Monthly income of claimant established to be Rs. 7000/-- And loss of future income is Rs. 831600 applying multiplieral 9- Compensation as Rs. 300000 under the head pain suffering and trauma, Rs. 3000 /- awarded charge 500000 medical treatment, Rs. 15000 Taxi charges and Rs. 50000 leave encashment- Claimant is entitled to Rs. 14,76600 as compensation- Rate of interest enhanced 9 % from 7% p.a- Award modified. Title: Oriental Insurance Company Ltd. vs. Basant Ram and another Page-682

Motor Vehicle Act, 1988- Section 166- Legal representative of a deceased can always file claim petition under the Act seeking therein compensation on account of death of deceased, who may be father, mother, brother, sister etc of such claimant. (Para 11).

Maintainability-Objection can not be permitted to be taken up at appellate stage- Appeal dismissed. (Para 12) Title: Pepsu Road Transport Corporation, Patiala vs. Mehar Chand (deceased) through LR's Sugriv Singh and others Page-690

'N'

Negotiable Instruments Act, 1881:- striking defence evidence dated 30.1.2020 by trial court in complaint under section 138 N. I Act- Keeping in view that it is not huge number of opportunities and medical certificate annexed by accused- One final opportunity was given subject to deposite of Rs. 10,000/- in National Disaster Response Fund.Title: Parminder Thakur vs. Manager, The H.P.State Cooperartive Agriculture and Rural Development Bank Limited Page-180

Negotiable Instruments Act, 1881- Closure of right of defendant to lead evidence dated 6.3.2020 by Ld. Civil Judge Court No. 4 Shimla- Petitioner- 86 years old lady- Witnesses could not be produced for bad weather- Considering the circumstances- One more opportunity granted to lead evidence subject to payment of costs of Rs. 3000/- to plaintiff.Title: Chura Mani vs. Harinder Singh Page-182

Negotiable Instruments Act, 1881:- Section 145 (2)- Notice of accusation put to the accused- Application under section 145 of NI Act, dismissed vide order dated 8.4.2019- Challenged- Held, that proper stage to entertain application under section 145 NI Act is after recording substance of accusation and after closure of or during leading of evidence of complainant – that the word "shall" in Section 145 (2) has casted a mandatory duty upon the court to call the witness(es) for examination /cross-examination on an application – Further, after putting notice of accusation to the accused, the Magistrate is required to decide the nature of trial i.e summary trial under Section 143 or regular trial under second proviso to Section 143- Trial Court committed illegality in dismissing application under section 145 NI Act- Petition allowed (Paras 9,10.25,30) Title: Vikas Sharma vs. Vishant Bali Page-511

Narcotic Drugs and Psychotropic Substances, 1985:-Section 21, 22, 29 ND&PS Act- during search petitioner skipped from house- 1500 capsules of Tharmdol recovered from kitchen- Petitioner absconded- Petitioner has criminal history – Similar cases under ND&PS Act- Sister of petitioner Overpowered at his residence throwing chaff containing 6.12 gm heroin- Custodial interrogation necessary- Not fit case to extend the benefits of section 438 of Cr.PC.Title: Raj Kumar @ Sethi vs. State of H.P. Page-133

Narcotic Drugs and Psychotropic Substances Act, 1985:– Sections 18,20 and 29 – Section 39 of H.P. Excise Act – Accused Madan Lal was found in exclusive and conscious possession of 1800 gms of Charas and 50 gms of opium from his residential premises - Accused convicted by the Trial Court- Cr. appeal preferred before Hon'ble High Court – Held, that the case property was proved to be untampered and intact – Independent witnesses admitted their authentic signatures during cross examination – No evidence was found that independent witnesses were coerced or pressurized for signatures – Mandate of Sections 91 & 92 Indian Evidence, Act attracted barring independent witness to orally resile from the contents of recovery memos– Accused Madan Lal failing to discharge the onus to explain apposite possession at the relevant time presumption under section 54 ND&PS Act drawn against him –Possession from where the

recovery was made found in the name of mother of convict- case of the prosecution is duly proved – Appeal dismissed. Title: Madan Lal Vs. State of H.P. (D.B.) Page-258

Narcotic Drugs and Psychotropic Substances Act, 1985:- Section 20- Both the accused persons were found in exclusive and conscious possession of 2 kgs. 520 gms of contraband being carried in a bag while travelling in a bus – Trial Court convicted both of them – Two appeals preferred – It was held that contraband was not recovered from personal search hence I.O was not required to seek the consent prior to search – Case property remained untampered – Both the independent witnesses supported the case – Conviction was found without perversity- Appeal dismissed. Title: Bali Ram vs. State of H.P.(D.B.) Page-321

Narcotic Drugs and Psychotropic Substances Act, 1985:– Sections 21 & 29 – Code of Criminal Procedure- Section 173, 468 & 473- An FIR was registered against the petitioner and other accused for the commission of offences punishable u/s 21 & 29 of NDPS Act – Trial court took cognizance and such order was challenged on the ground of limitation – It was held that state has explained the delay satisfactorily caused in launch of prosecution – Order not interfered keeping in view the object and purpose of NDPS Act – Complete record was not produced before the trial court- Directions issued to Director General of Police to take appropriate action against concerned authority/ police officers for submitting cancellation report, falling to explain cause of delay and giving illogical explanation- Petition disposed of. Title: Shikhil Katoch vs. State of Himachal Pradesh Page-327

'W'

Writ Jurisdiction:- The words used in the tender document cannot be ignored or treated as redundant or superfluous - that must be given meaning and their necessary significance - tender 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 condonation would amount to perversity in the understanding or application of the terms of tender ,,, which must be interfered with by a constitutional court. (Para 17) Title: M/s Amit Singla through its Sole Proprietor Mr. Amit Singla vs. State of Himachal Pradesh and others Page-65

TABLE OF CASES CITED

'A'

A. Ayyasamy versus A. Paramasivam and Others, (2016) 10 SCC 386;
A. Umarani v. Ragistrar, Cooperative Societies and others, (2004) 7 SCC 112;
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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

The Himachal Pradesh State Electricity Board Limited ...Non-applicant/Plaintiff.

Versus

1. M/s Valecha Engineering Limited Parvati H.E. Project State-II

..Non-applicant/Defendant No.1.

2. National Hydro Power Corporation Ltd. Parvati Electric Project-II

...Applicant/Defendant No.2.

OMP No. 169 of 2020 in COMS No.22 of 2019
Reserved on: 14.08.2020
Date of Decision: October 12, 2020

Code of Civil Procedure, 1908:- Order 39 of Rules 1 & 2- Non applicant/ plaintiff filed suit for recovery of Rs. 1,53,79,285/- alongwith interest with respect to electricity connection of applicant/ defendant No.1 at construction site of NHPC- NHPC being principal contractor is also allegedly liable to pay electricity charges- Application for interim injunction by NHPC restraining applicant/plaintiff from denying power connection at Parbati Hydroelectric Projects stage –II-I site in District Kullu- Held, that defendant can file and maintain application for temporary /interim injunction under order 39 Rules 1 & 2 CPC- Non-applicant/ plaintiff Board directed to consider the case of applicant/NHPC for allotting new electrical connection, subject to deposit of a sum of Rs. 15, 379,2,85/- by NHPC in Registry within 4 weeks- Petition disposed of accordingly (Paras 22, 25, 32).

Cases referred:

Padam Sen and another vs. State of Uttar Pradesh, AIR 1961 SC 218;
Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527;
Shakunthalamma vs. Kanthamma, AIR 2015 Karnataka 13.
Sivakami Achi vs. Narayana Chettiar, AIR 1939 Madras 495;
Rattu vs. Mala, AIR 1968 Rajasthan 212;
Suganda Bai vs. Sulu Bai and others, AIR 1975 Karnataka 137;
Dr. Ashis Ranjan Das vs. Rajendra Nath Mullick, AIR 1982 Calcutta 529;
Central Warehousing Corporation vs. Prabhu Narain Singh and another, AIR 2003 Allahabad 223;
Shiv Ram Singh vs. Smt. Mangara and others, AIR 1989 Allahabad 164;
Tanusree Basu and others vs. Ishani Prasad Basu and others, (2008) 4 SCC 791; Rikhabsao Nathusao Jain vs. Corporation of the City of Nagpur and others, (2009) 1 SCC 240;
Isha Marbles vs. Bihar State Electricity Board and another, (1995) 2 SCC 648;
Collison vs. Warren, (1901) 1 Ch. 812;
Carter vs. Fey, 1894(2) Ch. 541

For the Non-applicant/ Plaintiff: Mr.Tara Singh Chauhan, Advocate, through Video Conferencing.

For the Defendants: Mr.Surender Sharma, Advocate, for non-applicant/defendant No.1, through Video Conference.

Mr.Sanjeev Kuthiala, Senior Advocate, with Mr.C.N. Singh, Advocate, for applicant-defendant No.2, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

This application has been filed by applicant-defendant No.2 National Hydro Power Corporation Limited (in short 'NHPC') for interim directions under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure Code (in short 'CPC').

2. Non-applicant plaintiff, Himachal Pradesh State Electricity Board Limited (hereinafter referred to as the 'Board') has filed main suit for recovery of `1,53,79,285/- alongwith *pendente lite* and future interest @ 16% per annum from the defendants with respect to electricity connection provided to non-applicant/defendant No.1 at the work site of NHPC allegedly leviable upon non-applicant/defendant No.1 for unauthorized use of electricity as violation charges during existence of connection of electricity supply to non-applicant/defendant No.1. According to plaint, it was informed by NHPC that non-applicant/defendant No.1 has deserted construction site. It is further case of the Board that NHPC being a principal contractor has admitted its liability and agreed to pay electricity charges, but despite various reminders, it has failed to do so and, therefore, NHPC is also liable to pay electricity charges for consumption of electricity in execution of its work.

3. An application under Order 38 Rule 5 CPC has also been filed by the Board for attachment of the property of defendants before judgment.

4. Now, this application has been preferred by NHPC against non-applicant/plaintiff for restraining it from taking any coercive action in the form of denying a power connection of 3-phase, 2077KW (Contract demand 1400 KVA), 11 KV to NHPC at its Parbati Hydro Electric Project Stage-II-I site at Village Sheela, Barshaini in District Kullu and seeking direction to the Board to allow aforesaid power connection and issue Power Availability Certificate (in short 'PAC') in favour of NHPC during pendency of the suit. It is case of NHPC that despite the fact that dispute regarding recovery of `1,53,79,285/- is pending adjudication in the main suit, the Board is taking coercive action by not issuing PAC and providing power connection of 3-phase referred supra and is raising demand for payment of aforesaid amount, regarding which recovery suit is pending, before processing application of NHPC.

5. In response to the application, the Board has taken a stand that Himachal Pradesh Electricity Regulatory Commission, in exercise of power conferred in it, under Section 50(x) of sub-section (2) of Section 181 of the Electricity Act, 2003, read with Section 21 of the

General Clauses Act, 1897, has made Regulations which have been notified in Himachal Pradesh Rajpatra on 04.07.2020, wherein it has been clearly stipulated that without clearing arrears, fresh connection cannot be granted in the same premises. It is further submitted that Himachal Pradesh Electricity Supply Code 2009 (in short 'Electricity Supply Code, 2009'), as amended from time to time, in its Clause 5.2.13A, provides that in case of connection supply, sought to be released in the name of original consumer or owner or their legal heir, entire outstanding amount shall be recovered before release of new connection or release of supply for the premises in question and, therefore, in view of proviso to Clause 5.2.13A, NHPC is liable to pay charges and consequently this application is not maintainable. It is also contended on behalf of the Board that as per provisions of 36.2.5.2.(4) Electricity Sales Manual Part-1, provides for charges to be levied at the time of restoration of supply after permanent disconnection and recovery of all outstanding amount of previous connection and as per mandate of Statute, new connection cannot be given without clearing previous charges/dues.

6. Main objection raised on behalf of the Board is that defendant-NHPC is precluded from filing present application and as such, this application is not maintainable and, therefore, liable to be dismissed as NHPC, being defendant, has no right to file such application for interim, as prayed, in a suit filed by the Board. It is further submitted that case of NHPC does not fall under Order 39 Rule 1(a) CPC and so far as Order 39 Rules 1(b) and 1(c) are concerned, NHPC has no right to file application on the grounds which are available to the Board under these provisions for filing an application for interim direction. It is further submitted that Order 39 CPC does not permit the NHPC for filing application of the nature as has been filed in present case, and even by invoking Section 151 of CPC, such application can neither be maintained nor is to be held maintainable and, thus, for want of specific provisions under Order 39 CPC, entitling NHPC to maintain present application, this application deserves to be dismissed.

7. Reliance has been placed by learned counsel for the Board in ***Padam Sen and another vs. State of Uttar Pradesh, AIR 1961 SC 218; Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527;*** and ***Shakunthalamma vs. Kanthamma, AIR 2015 Karnataka 13.***

8. Learned counsel for NHPC has relied upon ***Sivakami Achi vs. Narayana Chettiar, AIR 1939 Madras 495; Rattu vs. Mala, AIR 1968 Rajasthan 212; Suganda Bai vs. Sulu Bai and others, AIR 1975 Karnataka 137; Dr. Ashis Ranjan Das vs. Rajendra Nath Mullick, AIR 1982 Calcutta 529, Central Warehousing Corporation vs. Prabhu Narain Singh and another, AIR 2003 Allahabad 223; Shiv Ram Singh vs. Smt. Mangara and others, AIR 1989 Allahabad 164; Tanusree Basu and others vs. Ishani Prasad Basu***

and others, (2008) 4 SCC 791; Rikhabsao Nathusao Jain vs. Corporation of the City of Nagpur and others, (2009) 1 SCC 240; and ***Isha Marbles vs. Bihar State Electricity Board and another, (1995) 2 SCC 648.*** He has also referred the judgments already cited by and on behalf of the Board.

9. I have given thoughtful consideration to the submissions made by learned counsel for the parties and have also gone through the judgments referred by them.

10. To decide this application, for submission made, following questions are necessary to be determined:-

1. Whether defendants can file an application for temporary injunction in a suit filed by the plaintiff?

2. Whether present application filed by NHPC is maintainable? and

3. If yes whether NHPC is entitled for relief sought in this application?

11. Relevant provisions of Order 39 Rule 1, Sections 94 and 151 of CPC, necessary to be considered for adjudication in this application are as under:-

Order-39

"1. Cases in which temporary injunction may be granted.-
Where in any suit it is proved by affidavit or otherwise-

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,

[(c) that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,]

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the Court thinks fit, until the disposal of the suit or until further orders."

Section-94

"94. Supplemental proceedings.-In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,-

(a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he

should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

(e) make such other interlocutory orders as may appear to the Court to be just and convenient."

Section-151

"151. Saving of inherent powers of Court.-Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

12. As is evident from bare provisions of Order 39 Rule 1(a), plaintiff as well as defendant are entitled to maintain application for temporary injunction, where property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree. However, such right is not available to the defendant under Order 39 Rules 1(b) and 1(c).

13. Section 94(c) and (e) empowers the Court to grant temporary injunction and to make such interlocutory order as deemed just and convenient by the Court, if it is so prescribed. It means that for exercising power granted to the Court to prevent ends of justice being defeated under Section 94 of IPC, express provision prescribing the same in the Rules must be there. However, no such limitation has been provided under Section 151 CPC, which provides saving of inherent power of the Court by stating that nothing in CPC shall be deemed to limit or otherwise affect the inherent power of the Court to make such order as may be necessary for ends of justice or to prevent abuse of the process of Court. Therefore, power under Section 151 of CPC is not inhibited by the provision of Section 94 CPC or Order 39 CPC. However, in pronouncements of the Supreme Court as well as various High Courts referred

supra, particularly as reiterated in ***Padam Sen's*** and ***Manohar Lal Chopra's cases*** its inherent jurisdiction, should be exercised by the Court only when it considers it absolutely necessary for ends of justice to do so. In addition, Supreme Court has also placed three restrictions on exercise of inherent power by the Court, which are as under:-

> "1. Firstly, the inherent power should not be exercised in any way in conflict with what has been expressly provided in the CPC;
>
> 2. Secondly, the power cannot be exercised against the intention of the legislature; and
> 3. Thirdly, it shall not be exercised in a manner, which would be contrary to or different from the procedure expressly provided in the CPC."

14. In ***Sivakami Achi's case***application filed by the defendant was held to be maintainable under Order 39 Rule 1(a) CPC.

15. In ***Rattu's case,*** Rajasthan High Court has also referred judgment passed in *Sivakami Achi's case* in the arguments of the defendant, but without relying thereon, revision petition was dismissed with modification for the reason that plaintiff had delivered possession over the fields to the defendant and in it issue of maintainability of application filed by the defendant was not considered on merit.

16. In ***Sugandha Bai's case*** relying upon earlier decision of English Court titled as ***Collison vs. Warren, (1901) 1 Ch. 812,*** it was held by High Court of Karnataka that defendant can maintain an application for interim injunction in a suit filed by the plaintiff, where defendant's claim of relief arises out of the plaintiff's cause of action or is incidental to it. But this judgment has been overruled by Full Bench of the Karnataka High Court in ***Shakunthalamma's case.***

17. Judgment of Single Bench of Karnataka High Court, in ***Sugandha Bai's case,*** though has been overruled by Full Bench of the said High Court in ***Shakunthalamma's judgment,*** however subsequent thereto it has also been referred and relied upon by other High Courts like Allahabad High Court and Calcutta High Court in judgments referred herein. Reason assigned by Full Bench for overruling is that there is no provision in the CPC providing such impediment by stating that when Statute prescribes a particular procedure set out in a provision in which word 'cause of action' is conspicuously missing it is not possible to hold that a defendant can maintain application for injunction if it is based on the same cause of action as that of the plaintiff or incidental thereto. In my considered opinion this reason may be valid with respect to application preferred under Order 39 CPC where procedure has been set out in CPC but the same may not correct with respect to an application, to be preferred by defendant, invoking inherent jurisdiction of the Court. Therefore, when it has been held that in a suit by

plaintiff, defendant can file an application for interim injunction, on a ground other than as available under Order 39 Rule 1(a) CPC, by invoking inherent powers under Section 151 CPC, then in absence of specific provision, the Court is not only empowered but under obligation to define just, reasonable, relevant and logical limits for exercise of such right. Thus, in case of filing of an application by defendant invoking inherent powers of the Court it would be appropriate to impose such condition as envisaged in ***Sugabndha Bai's case.***

18. In judgment ***Dr.Ashis Ranjan Das's case,*** passed by learned Single Judge of Calcutta High Court, after considering ***Sugandha Bai's case***and judgment in ***Carter vs. Fey,*** reported in ***1894(2) Ch. 541,*** the application for interim direction filed by the defendant has been held maintainable on the ground that defendant's case for relief was arising out of the plaintiff's cause of action and in any event it was incidental thereto.

19. The Single Bench of Allahabad High Court in ***Central Warehousing Corporation's case,*** has held that application of defendant for interim injunction, in a suit by the plaintiff, was maintainable for being arisen out of plaintiff's cause of action as well as under Order 39 Rule 1(a) of CPC.

20. In ***Shiv Ram Singh's case,*** Single Bench of Allahabad High Court, after considering the judgment of the Supreme Court in *Manohar Lal Chopra's case* and other judgments of the Allahabad High Court, has held that where case of defendant is not covered under Order 39 Rules 1 and 2 CPC, there also, Court has jurisdiction to grant interim injunction under its inherent power, where it is deemed necessary by the Court under the compelling circumstances to do so for the ends of justice and/or to prevent abuse of the process of the Court.

21. The Supreme Court in ***Tanusree Basu's*** and ***Rikhabsao Nathusao Jain's cases,*** has reiterated the principle propounded in *Mahohar Lal Chopra's case* that it is a well settled principle of law that Order 39 Rule 1 CPC is not the sole repository of the power of the Court to grant injunction and Section 151 of CPC confers power upon the Court to grant injunction if the matter is not covered by Rules 1 and 2 of Order 39 of CPC.

22. After considering judgments referred supra, on the issue and provisions of Sections 94 and 151 read with Order 39 of CPC, according to my considered view, answer to first question is that defendant, in appropriate facts and circumstances, can file an application for temporary injunction/interim order in a suit filed by the plaintiff in following terms:-

(1) Under Order 39 Rule 1(a) of the CPC both the plaintiff and the defendant can maintain an application for the reliefs set out in the said provision;

(2) Insofar as relief under Order 39 Rule 1(b) and (c) is concerned, such a relief is available only to the plaintiff and the defendant cannot maintain an application for the said reliefs in a suit filed by the plaintiff irrespective of the fact that his right to such relief arises either from the same cause of action or arises subsequent to filing of the suit. However, it is open to the defendant to maintain a separate suit against the plaintiff and seek relief provided under Order 39 Rule 1(b) and (c) of the CPC;

(3) In cases which do not fall under Order 39 Rule 1 of the CPC, the Court has the inherent jurisdiction to grant the relief of injunction in its discretion, if it is satisfied that such an order is necessary to meet the ends of justice or to prevent abuse of process of the Court and nothing in this CPC shall limit or otherwise affect such inherent power of the Court;

(4) Inherent power can be invoked by both plaintiff and defendant for seeking injunction but it should be connected or related to subject matter of the suit directly or indirectly, having probability of impact on interest of parties;

(5) Invoking inherent powers of the Court, defendant can maintain an application for interim injunction in a suit filed by the plaintiff, where defendant's claim of relief arises out of the plaintiff's cause of action or is incidental to it; and

(6) Invoking of inherent power for issuing temporary injunction and/or passing interim order should not be in conflict with express provision of CPC in any way, against the intention of the legislature in any manner and contrary to or different from express procedure contained in CPC.

23. In present case, NHPC has filed this application for restraining the Board from recovering the amount, for recovery of which present suit has been filed, from NHPC for consideration of its application submitted to the Board for power connection in its own name on the Project Site. The Civil Suit has been filed for recovery of amount by the Board, with respect to consumption of electricity in a connection allotted to non-applicant/defendant No.1, a Contractor, in the Project Site of NHPC.

24. It is claim of the Board that the defendants are liable to pay the said amount. So far as demand for payment of the said amount for consideration of application of NHPC is

concerned, it is submitted that in view of provisions of sub-para 5.2.13A inserted in the Electricity Supply Code, 2009, vide 4th amendment 2020 of the Regulations, Board is empowered to do so and recovery of entire outstanding amount is precondition before release of new connection or release of supply for the premises in the name of original consumer or owner or his legal heirs, in case there is outstanding amount against the previous consumer for a connection/supply of the premises. Sub-para 5.2.13A reads as under:-

> "The licensee will also be entitled to recover, in addition to the charges recoverable by it under the Himachal Pradesh Electricity Regulatory Commission (Recovery of Expenditure for Supply of Electricity) Regulations, 2012 and any other relevant regulations for providing connection and supply, the outstanding amount against the previous consumer from the next owner/occupier of the premises subject to a maximum limit of the amount equal to the average billing for two months worked out on the average for past twelve months immediately prior to the temporary disconnection of the previous consumer:
>
> Provided that in case the connection/supply is sought to be released in the name of the original consumer or owner or their legal heirs, the entire outstanding amount shall be recovered before release of new connection or release of supply for the premises:
>
> Provided further that the amount to be recovered on this account shall not exceed the total updated outstanding amount, including the interest after permanent disconnection, but after adjustment of the security deposit of the previous consumer:
>
> Provided further that the Licensee shall recover the balance outstanding amount, if any, after adjustment of the amount recovered from the new occupier, through any other means available to it:
>
> Provided further that in case the connection is released after recovery of earlier dues from the new applicant/consumer and the licensee, after resorting to appropriate remedies, recovers the full or part of the dues from the previous consumer/owner or occupier of that premise, the amount so recovered shall be adjusted against the expenses incurred to recover such dues as well as the balance outstanding dues against the original consumer, not recovered from the new consumer, and the balance if any after such adjustment shall be refunded to the new consumer/owner or occupier from whom the dues have been recovered:

> Provided further that in cases where the new consumer avails the relief in the infrastructure development charges payable by it as per the special provisions of the Himachal Pradesh Electricity Regulatory Commission (Recovery of Expenditure for Supply of Electricity) Regulations, 2012 whereunder the payment of entire outstanding dues is a precondition, the provisions of this sub-para shall not be applicable and in such cases the relevant provisions of HPERC (Recovery of Expenditure for Supply of Electricity) Regulations, 2012 shall have overriding effect."

25. As submitted by learned counsel for the Board that application of NHPC for providing connection and supply of electricity is at the stage of issuance of PAC for a prospective consumer as the NHPC, earlier had applied for PAC for 1000 KW with Contract Demand of 625 KVA on 24.04.2020 and thereafter an application for PAC for 2077 KW load with 1400 KVA Contract Demand has been submitted on 23.06.2020. In response thereto, Electricity Board has issued a Demand Notice to clear outstanding amount on the basis of new Regulations 5.2.13A of the Electricity Supply Code, 2009 and after payment of outstanding amount feasibility of new connection would be checked and in case it is found feasible then, Demand Notice will be issued for advanced cost share towards IDC as per Clause 3.2 of the Electricity Supply Code, 2009 and in case amount is deposited in 60 days, thereafter PAC will be issued to the consumer, otherwise PAC will be rejected.

26. Learned counsel for the Board has further submitted that after issuance of PAC, NHPC shall have to file an application for new electricity connection alongwith valid PAC and agreement Form CS-1. Thereafter, test report of installation as well as safety clearance from Chief Electrical Inspector would be obtained and manual instructions, with respect to receipt of application, acknowledgement thereof and posting of application in service register and maintaining separate seniority list, will be followed and connected load will be verified as per Instruction No.4 and thereafter load will be sanctioned as per Instruction No.6 and thereafter with intimation of acceptance of application, Demand Notice will be issued and agreement will be executed as per Instruction No. 7 and at this stage, prospective consumer would acquire the status of consumer and as per Instruction No.12, account number shall be allotted to him.

27. According to learned counsel for the Board, for processing application of NHPC for PAC and electricity connection, payment of entire outstanding amount with respect to connection availed by the previous consumer in the same premises is mandatory and, therefore, interim prayer made by NHPC is liable to be rejected.

28. In response, learned counsel for NHPC, referring pronouncement of the Apex Court in ***Isha Marbles' case,*** has contended that liability of non-applicant/defendant No.1 cannot be imposed upon applicant-NHPC. Relevant paras of the judgment, as referred, are as under:-

> "56. From the above it is clear that the High Court has chosen to construe Section 24 of the Electricity Act correctly. There is no charge over the property. Where that premises comes to be owned or occupied by the auction-purchaser, when such purchaser seeks supply of electric energy he cannot be called upon to clear the past arrears as a condition precedent to supply. What matters is the contract entered into by the erstwhile consumer with the Board. The Board cannot seek the enforcement of contractual liability against the third party. Of course, the bona fides of the sale may not be relevant.
>
> 57. The form of requisition relating to the contract is in Annexure VIII prescribed under clause VI of the Schedule to the Electricity Act. They cannot make the auction-purchaser liable. In the case of Isha Marbles we have already extracted the relevant clause wherein the consumer was asked to state his willingness to clear off the arrears to which the answer was in the negative. Therefore, the High Court has rightly held that the auction-purchaser, namely "the writ petitioner before us is ready and willing to enter into a new contract (*sic* and) that the auction-purchaser does not intend to obtain the continuance of supply of electrical energy on the basis of the old agreement." *It is true that it was the same premises to which reconnection is to be given.* Otherwise, with the change of every ownership new connections have to be issued does not appear to be the correct line of approach as such a situation is brought about by the inaction of the Electricity Board in not recovering the arrears as and when they fall due or not providing itself by adequate deposits.
>
> 58. ... ...
>
> 59. ... ...
>
> 60. ... ...
>
> 61. What we have discussed above appears to be the law gatherable from the various provisions which we have detailed out above. It is impossible to impose on the purchasers a liability which was not incurred by them."

29. Learned counsel for the Board has submitted that pronouncement of the Apex Court in ***Isha Marbles' case***, is based upon unamended Electricity Supply Code 2009 and after insertion of sub-para 5.2.13A in the Regulations, this judgment has become irrelevant for the

purpose of adjudication of present case. Further, he has also referred documents alongwith plaint, which indicate that in the year 2016 electricity connection allotted to non-applicant/defendant No.1 was disconnected for non-payment of electricity charges. However, thereafter, for intervention of officers of NHPC, whereby the Board was assured that in case of non-payment of charges by non-applicant/ defendant No.1, applicant-NHPC would deduct the said amount from the amount payable to non-applicant/defendant No.1 and would release it to the Board, connection was restored in favour of non-applicant/defendant No.1 in October 2018, but NHPC had failed to deduct the amount payable to the Board and, therefore, NHPC is also liable to pay such charges and on this count also, demand raised by the Board to pay entire outstanding amount before consideration of the application submitted by NHPC, is justified.

30. With respect to claim of applicant-NHPC that it is suffering loss of approximately `5 Crores per day, learned counsel for the Board has responded that NHPC would have deposited demanded amount which is a sum of `1,53,79,285/- to avoid loss of `5 Crores per day, as claimed in the application, as if amount so demanded is paid by NHPC, same would be adjustable against other charges payable by applicant-NHPC, in terms of decision of the Civil Court as well as recovery of the amount from non-applicant/defendant No.1, as provided in fourth proviso to para 5.2.13A of Regulations.

31. As is evident from the subject matter of the application and arguments advanced by learned counsel for the parties, the subject matter of the application and relief sought therein, is connected and related to the subject matter of the suit, therefore, applicant-NHPC is entitled to maintain this application and to seek relief sought for. However, as to whether in the facts and circumstances of the case, relief sought can be granted or not, is another issue.

32. Considering entire factual matrix of the case, submissions made on behalf of parties and provisions of Electricity Supply Code, the Board is directed to consider the case of the applicant-NHPC for issuance of PAC as well as allotting new electrical connection, subject to deposit of a sum of ₹1,53,79,285/- by applicant-NHPC in the Registry of this Court within four weeks from today or furnish a bank guarantee amounting to ₹2 Crores to the satisfaction of the Registrar (Judicial) within the same period.

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

CWP No. 2571 of 2020

Smt. Savita .....Petitioner.

Versus

State of HP and others .....Respondents

CWP No.4080 of 2020

Anil Jamwal .....Petitioner

Versus

State of HP and others .....Respondents

CWP No.2571 of 2020 a/w
CWP No.4080 of 2020
Decided on: 12.10.2020

Constitution of India, 1950- Article 226- Petitioners serving as TGT's (Non-medical) with respondent- Inter-se transfer of petitioners on request after condoning short stay vide order dated 20.7.2020 Cancelled vide order dated 21.7.2020 is challenged- Held, that once the request of the petitioners for mutual transfer accepted by competent Authority after due application of mind, the same can not be rescinded without assigning reasons- Both petitions allowed and impugned office order dated 21.7.2020 quashed. (Paras 7, 9)

For the petitioner(s): Mr. Ashwani Kaundal, Advocate, for the petitioner in CWP No.2571 of 2020. Mr. Diwakar Dev Sharma, Advocate, in CWP No.4080 of 2020.

For the respondent(s): Mr. Sumesh Raj, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General, with Ms. Divya Sood, Deputy Advocate General, for the respondents-State, in both the petitions.

Mr. Diwakar Dev Sharma, Advocate for respondent No.5 in CWP No.2571 of 2020 and Mr. Ashwani Kaundal, Advocate, for respondent No.5 in CWP No.4080 of 2020.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(oral)*

As common facts are involved in these petitions, they are being disposed of by a common judgment.

2. Petitioners before the Court are serving TGTs (Non-Medical) with the respondent-Department. Vide office order dated 20th July, 2020, petitioner, Savita Kumari, who was serving as TGT (Non-Medical) at GHS Lanjiana, District Hamirpur, H.P. was ordered to be transferred to GHS Jiwani, District Hamirpur, H.P. and petitioner, Anil Jamwal, was ordered to be transferred vice-versa from GHS Jiwani to GHS Lanjiana. A perusal of office order dated 20th July, 2020, demonstrates that these transfers were effected by condoning short stay, without TTA/JT, meaning thereby that the transfers were affected by the competent authority on request of the incumbents therein.

3. Common grievance of the petitioners is that subsequently vide impugned order dated 21st July, 2020, office order dated 20th July, 2020, vide which the transfers of petitioners vice-versa to each other, stands cancelled in the following terms:-

> *"Transfer orders of Sh. Anil Jamwal, TGT (NM) from GHS, Jiwani, Distt. Hamirpur to GHS, Lanjiana, Distt. Hamirpur issued vide this Directorate Office order of even No. dated 20.07.2020, appearing at Sr. No.22-21 are hereby cancelled, if the incumbents have not joined, with immediate effect."*

4. Learned counsel for the petitioners have argued that the impugned office order dated 21st July, 2020, vide which the transfers of the petitioners vice-versa to each other, has been cancelled, is nothing, but an act of colourable exercise of powers, because the impugned order is silent as to why the transfers of petitioners were being recalled. This has been done neither on account of administrative exigency nor in public interest, but for extraneous reasons. Accordingly, they have prayed for quashing of the impugned order dated 21st July, 2020, with further direction to the respondents to give effect to the transfer order dated 20th July, 2020, qua the petitioners. Learned counsel for the petitioners have also relied upon the judgment of the Hon'ble Division Bench of this Court in ***CWP No.1811 of 2020, titled as Surinder Singh Versus State of H.P. & others,*** decided on June 29, 2020.

5. On the other hand, learned Additional Advocate General has supported the impugned office order dated 21st July, 2020, by arguing that the respondent-Department is well within its right to cancel the earlier transfer orders of the petitioners and the petitioners have no right to be posted at a particular station. Accordingly, he has prayed that as the transfer is in exigency of service, therefore, as the petitions are without any merit, same be dismissed.

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

7. In my considered view, the impugned office order dated 21st July, 2020, vide which the transfers of petitioners have been cancelled, are not sustainable in the eyes of law. This, I say so for the reason that though it is the prerogative of the employer as to where an incumbent has to be posted, yet, this prerogative cannot be used arbitrarily by the employer. In the present case, office order dated 20th July, 2020, demonstrates that it was on the request of both the petitioners that they were transferred vice-versa to each other, meaning thereby that once the request was so made by the petitioners for their mutual transfers, the competent authority after due application of mind acceded to the same and vide office order dated 20th July, 2020, posted them by way of transfers vice-versa to each other. In these circumstances, it defies logic as to what prompted the same authority to rescind this order just after one day by

passing the earlier order. The impugned order is completely non-speaking as reasons which led to cancellation of the transfers of petitioners are not spelt out in the same. This demonstrates that issuance of office order dated 21st July, 2020, has nothing, but an act of colourable exercise of powers.

8. The Hon'ble Division Bench of this Court in ***CWP No.1811 of 2020, titled as Surinder Singh Versus State of H.P. & others*** *(supra),* vide para-4 of the said judgment, has been pleased to hold as under:-

> *"This transfer was cancelled vide order dated 15.6.2020, Annexure P-4, which is silent about the reasons for which it was cancelled. Once the petitioner has been transferred vide order dated 12.6.2020, after that in case the respondents wanted to cancel it, then they should have explained the reasons before passing any rescinding order. The previous order was passed by the prior approval of the competent authority whereas it is not the case with Annexure P-4. This is another reason to interfere with the impugned order."*

9. In view of the observations made hereinabove, both these petitions are allowed and the impugned office order dated 21st July, 2020, is quashed and set aside and the respondents are directed to give effect to transfer order dated 20th July, 2020, qua the petitioners, vide which they have been posted at GHS Jiwani and GHS Lanjiana, District Hamirpur, H.P., respectively. Pending miscellaneous application(s), if any, also stand disposed of.

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

Smt. Onkaar Devi

....Petitioner.

Versus

The State of Himachal Pradesh and others

....Respondents.

CWPOA No.5422 of 2019
Decided on: 09.10.2020

Constitution Of India, 1950- Article 226- Petitioner engaged as JBT on Adhoc basis ,regularized as such- Benefit of ad-hoc service followed by regular service for the purpose of pay fixation and increments granted to petitioner in a writ petition- Petitioner's grievance is with regard to notice dated 18.6.2015 claiming overpayment made to her- Held, that after benefit of ad-hoc service is given to petitioner, State can not be permitted to claim overpayment on the ground that arrears be restricted to three years before filing of writ petition- Even, recovery from petitioner after her superannuation is not permissible- Petition allowed and impugned notice dated 18.6.2015 quashed. (Paras 7, 8)

For the petitioner: Mr. Nipun Sharma, Advocate.

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

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(oral)*

The controversy involved in this petition is in a very narrow compass. The petitioner was initially engaged as JBT on ad-hoc basis in the year, 1981. Thereafter, her services were regularized as such in the year, 1997. She was promoted as Drawing Master on regular basis in the year, 1998. The petitioner approached this Court alongwith other similarly situate persons, by way of CWP No.8016 of 2011, titled as Jaram Singh and others Versus State of Himachal Pradesh and others, praying for the relief that benefit of ad-hoc service followed by regular service, be granted for the purpose of pay fixation and increment. The aforesaid petition was disposed of by this Court, vide judgment dated 24th October, 2011, alongwith connected matters, in the following terms: -

> *"The petitioners claim the benefit of ad hoc service followed by regular service for the purpose of pay fixation and increments. According to the petitioners, the issue is covered in their favour by the judgment of this Court rendered in LPA No.36 of 2010, Sita Ram Versus State.*
>
> *2. Therefore, the writ petitions are disposed of directing the respondent concerned to examine the matter, after verifying the facts, in the light of the judgment referred to above and the eligible benefits on account of the fixation of pay shall be disbursed within a period of three months from the date of the production of a copy of this judgment along with a copy of the writ petition and the copy of the judgment referred to above by the petitioner concerned.*
>
> *4. The writ petitions are disposed of, so also the pending applications, if any."*

2. It appears that thereafter, benefit with regard to ad-hoc service rendered by the petitioner followed by regular service was given to her, after fixing the pay and increment. The petitioner retired on 31st March, 2015, on attaining the age of superannuation.

3. The grievance of the petitioner is with regard to communication dated 18.06.2015, Annexure A-4, vide which, a notice was issued to the petitioner, calling upon her to deposit an amount of Rs.1,35,576/- on the pretext that the same is outstanding for recovery from her due to overpayment made to her with effect from 01.05.1986 to 11.09.2008.

4. Learned counsel for the petitioner has argued that the impugned notice is not sustainable in the eyes of law as there was no overpayment of any kind made to the petitioner,

as has been shown in communication dated 18.06.2015, Annexure A-4, for the period 01.05.1986 to 11.09.2008. According to him, the implementation of judgment earlier filed by the petitioner was done by the State, by granting due and admissible arrears to the petitioner and in the garb of impugned notice, the respondent-Department, now, cannot be permitted to claim any amount from the petitioner on the purported ground of overpayment. He has further submitted that even otherwise, the petitioner superannuated on 31st March, 2015, and the impugned notice stood served upon the petitioner after her superannuation, on 18.06.2015, and therefore, the same is also liable to be quashed and set aside in view of the law laid down by the Hon'ble Supreme Court in ***State of Punjab and others Versus Rafiq Masih (White Washer) and others, reported in (2015) 4 Supreme Court Cases 334.***

5. Learned Additional Advocate General, on the contrary, has argued that there is no infirmity in the impugned notice having been issued by the respondent-Department, because it is a clear-cut case of overpayment, which stood made to the petitioner while complying with the earlier judgment passed by this Court, when the arrears were released to the petitioner as same were not restricted to three years as from the date of filing of the petition.

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

7. In my considered view, the impugned notice, Annexure A-4, which has been issued by the respondent-Department, calling upon the petitioner to deposit an amount of Rs.1,35,576/- on the ground that the same was overpayment wrongly made to the petitioner for the period 01.05.1986 to 11.09.2008, is not sustainable in the eyes of law. This, I say so for the reason that as it is not in dispute that after the pronouncement of judgment in the earlier writ petition filed by the petitioner, benefit of ad-hoc service was given to the petitioner for the purpose of pay fixation and increment, then now, the State cannot be permitted to call upon the petitioner to deposit back, a part of said payment on the pretext that the petitioner was not entitled to complete arrears as the same were to be restricted to three years before the date of filing of writ petition. In number of cases, this stand is being taken by the respondent-State in denying arrears to the employees without there being any restriction put in by the Court, while granting the relief to the employees, which is completely wrong.

8. Even otherwise, in view of the law laid down by the Hon'ble Supreme Court of India in ***State of Punjab and others Versus Rafiq Masih (White Washer) and others,*** the impugned notice is not sustainable in the eyes of law. In the judgment *(supra),* the Hon'ble Supreme Court has been pleased to hold in para-18 that certain recoveries are impermissible in law, including recovery from retired employees or employees who are due to retire within one year of the order of recovery. Here is a case, where recovery is being sought to be made from an

employee, after she had superannuated from service, which is in complete derogation of the judgment pronounced by the Hon'be Supreme Court. That being the case, impugned notice dated 18.06.2015, Annexure A-4, is quashed and set aside and the petition is allowed to this extent. Pending miscellaneous 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.

Pankaj Kumar ...Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

CWP No. 4235 of 2019
Decided on: 07.10.2020

Constitution of India, 1950- Article 226- Petitioner suffering from as genetic disorder "Haemophilia"- Petitioner posted as Junior Basic Teacher (JBT) at GPS, Farehar, District Mandi though resident of District Kangra- Representation against posting rejected- Petitioner has challenged order rejectinghis representation, praying for transfer near native place- Held, that petitioner suffering from rare bleeding disorder " Hemophilia" - 3% quota reserved for inter district transfer- Petition allowed, in exceptional circumstances of the case, direction issued to transfer the petitioner to Government Primary School Rakkar, District Kangra. (Paras 7, 15 & 18).

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

For the Respondents: Mr. Vinod Thakur, Mr. Vikas Rathore, Mr. Shiv Pal Manhans, Additional Advocate Generals with Mr. Bhupinder Thakur, Ms. Seema Sharma and Mr. Yudhbir Singh Thakur, Deputy Advocate Generals, through Video Conferencing.

PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, J.(Oral)

The petitioner is specially abled person suffering from a rare genetic disorder called "Haemophilia". He was appointed as Junior Basic Teacher (for short 'JBT') vide office order dated 10.05.2019 and posted at GPS, Farehar (Drang-II), District Mandi, H.P.

2. The petitioner is a resident of District Kangra and aggrieved by his order of posting at District Mandi, filed Original Application No.2033 of 2019 before the learned

Administrative Tribunal. On 22.5.2019, the learned Tribunal disposed of the Original Application by passing the following directions:

> *"However, in the peculiar facts and circumstances of the present case, particularly the illness with which the applicant is afflicted and the documents filed alongwith the original application, the applicant shall be at liberty to apply for inter-district transfer to the competent authority with prayer for relaxation of qualifying service for such transfer, who shall consider the same in accordance with the rules/law, sympathetically as expeditiously as possible, preferably within three months from the date of submission of the representation."*

3. In compliance to the directions of the learned Tribunal, the petitioner preferred a detailed representation before the competent authority on 10.07.2019. However, the same was rejected by respondent No.2 vide order dated 20.09.2019 on the ground that in the transfer policy there was no provision for transfer of employees appointed on contractual basis. Furthermore, it was stated that the petitioner should have considered his disability prior to applying for appointment against the post of JBT in another District.

4. Aggrieved by the aforesaid order, the petitioner has approached this Court by filing the instant petition for the grant of following reliefs:

> *"I. The petitioner may kindly be transferred to:*
> *a. Govt. Primary School, Rakkar Block Rakkar, District Kangra.*
> *b. Govt. Central Primary School, Kaloha Block Rakkar, District Kangra.*
> *Or any other suitable location near the native place of the petitioner that this Hon'ble Court may deem fit."*

5. The respondents have contested the petition by filing reply wherein it is stated that the petitioner being JBT is borne on District Cadre post and cannot be transferred out of District under 3% quota before completing thirteen years of service. It is once again reiterated that the petitioner belongs to District Kangra, yet he applied for the post in District Mandi and having been selected, has no one to blame except himself.

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

7. At the outset, it needs to be observed that there is no complete bar in inter-district transfers, rather 3% quota has been kept reserved for this purpose. This position is not even disputed by the official respondents.

8. Going by the stand taken by the respondents, we are clearly of the view that probably the respondents have no understanding of the disease 'Haemophilia' or else they would not have adopted such a stiff stand.

9. Hemophilia is a genetic and severe type of bleeding disorder and if not taken care of bleeding can turn into permanent severe disability or can even lead to death.

10. In Loyal's Medical Dictionary by Dr. Sri Nandan Bansal published by International Publishing House, "Haemophilia" is defined as "A hereditary hemorrhagic disease in which blood fails to clot due to deficiency of a blood coagulation factor and abnormal bleeding occurs with swelling of the joints.".

11. Haemophilia is the commonest form of inherited bleeding disorder and the burden of the disease is the second highest in India after the USA. It is a rare and complex condition arising from congenital deficiencies of coagulation factors, i.e. factor VIII protein (Haemophilia A) and factor IX protein (Haemophilia B). The disorder results from defective gene mutation.

12. Article 12 of the Universal Declaration on the Human Genome and Human Rights provides and casts a duty on the State to conduct research in biology, genetics and medicine concerning the human genome to seek relief from suffering and improve the health of individuals and humankind. Genome wide linkage analyses in inherited bleeding disorder enables the pathophysiological understanding of clinically relevant phenotype-genotype correlation. The knowledge of causative gene mutations will facilitate genetic counselling in affected families as well as identifying predicators of inhibitors. Such scientific evidence based information can be applied to a personalised treatment regime ensuring its cost effectiveness.

13. Haemophilia induced disability, caused by prolonged bleeding in the joints and muscles, compounds the disease burden on the patient. Sub-optimal and delayed treatment ultimately causes permanent damage. The issue of the prevention of disability has been dealt with in Section 25 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. In essence, the Act seeks to prevent disability through early detection and treatment. However, PWH are not covered by the provisions of this Act.

14. Since health is a State subject, it is duty bound to develop a comprehensive policy for haemophilia care to address the unmet health care needs of haemophilia patients and persons suffering from other disease like thalassaemia etc. and ensure equity.

15. No doubt, the petitioner though belonged to District Kangra but was selected and appointed in District Mandi and would have been aware of the fact that JBT being a District cadre post, he would have to serve in District Mandi. But then the petitioner would not have known that despite there being provision for inter-state transfer to the extent of 3% quota and the petitioner being specially abled, the State would be totally insensitive.

16. This kind of apathy, indifference and spiritlessness on behalf of the State towards the specially abled persons is indeed unfortunate and is deprecated.

17. The Governments in India, be it Central or State have now provided 3% reservation in jobs for physically challenged in certain States like Himachal Pradesh. Since, the

State has also made provision for reservation and promotion, therefore, we really fail to understand that why special quota has not been prescribed for handicapped like the petitioner under 3% quota against inter-state transfer.

18. It is high time that the State Government prescribes a quota for the differently abled and in the meanwhile taking into consideration the exceptional facts and circumstances of this case, we direct the respondents to transfer the petitioner to Government Primary School, Rakkar Block Rakkar, District Kangra or Government Central Primary School, Kaloha Block Rakkar, District Kangra.

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

20. For compliance, to come up on **28.10.2020.**

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

Virender Singh Thakur ....Petitioner.

Versus

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

CWP No.3341 of 2020
Decided on: 01.10.2020

Constitution of India, 1950- Article 226- Petitioners' grievance is with regard to his transfer from Jungle Beri to Kullu as Commandant Home Guards within two months- Notification of transfer dated 22.8.2020 challenged- Held, that no material on record to demonstrate that transfer vide notification dated 22.8.2020 is in violation of Section 56 H.P Police Act, 2007- Petitioner not entitled for any protection under section 12 of 2007 Act- Transfer vide impugned notification in public interest or administrative exigency and not at the behest of private respondent- Petition dismissed. (Paras 12, 13, 14, 16 & 17)

For the petitioner: Dr. Lalit Kumar Sharma, Advocate.

For the respondents: Mr. Ashok Sharma, Advocate General, with Mr. Sumesh Raj, Additional Advocate General.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(oral)*

Petitioner, who is an Officer belonging to H.P. Police Service, vide Annexure P1, notification dated 20th February, 2020, on placement as Superintendent of Police, was ordered to be posted as SP, SDRF, Junga, District Shimla. The Court stands informed that before the

placement of petitioner, as such, he was serving as Assistant Superintendent of Police, Sirmour District at Nahan. Thereafter, vide notification dated 2nd June, 2020, Annexure P2, petitioner was ordered to be transferred from the post of SP, SDRF, Junga, District Shimla to the post of SP, PTC Daroh, District Kangra. This order, however, was, subsequently, modified and vide notification dated 8th June, 2020, Annexure P3, petitioner was ordered to be transferred to as Commandant, 4th IRBn Jungle Beri, District Hamirpur. In compliance to said order, petitioner joined at Jungle Beri, District Hamirpur, on 11th June, 2020.

2. Grievance of the petitioner is that within a short span of about two months, vide Annexure P9, notification dated 22nd August, 2020, he has again been transferred from his present place of posting at Jungle Beri to Kullu as Commandant Home Guards, which order, according to the petitioner, is in violation of the provisions of Section 12 of H.P. Police Act, 2007, read with Section 56 thereof. According to the petitioner, notification dated 22nd August, 2020, Annexure P9, has not been issued by the State either on account of any administrative exigency or in public interest, but the same has been issued just to accommodate the private respondent, whose husband also happens to be an Officer of Indian Police Service and who vide same notification, is ordered to be posted as Superintendent of Police Hamirpur. In this background, it has been prayed by the petitioner that as the impugned transfer order has been passed by the State by violating the provisions of Sections 12 and 56 of the H.P. Police Act, 2007, by ignoring the fact that petitioner is at the verge of superannuation as he was to superannuate on 31st May, 2021, the impugned notification be quashed and set aside.

3. As per report of the Registry, private respondent has not been served, however, learned Advocate General, on instructions, submits that he has instructions to appear on behalf of private respondent in the petition, who adopts the reply filed on behalf of other respondents.

4. While opposing the petition, State has submitted that challenge by the petitioner to the transfer order on the ground of short stay is not sustainable in the eyes of law, because as the petitioner is Class-I Officer, therefore, the Department is within its rights to transfer the petitioner keeping in view the exigency of service. It is further submitted on behalf of the State that post to which petitioner was transferred at Jungle Beri, in fact, has been manned by the cadre of Indian Police Service, whereas, the petitioner belongs to H.P. Police Service. Therefore, in order to avoid any complication, he was ordered to be posted as Commandant Home Guards Kullu. Learned Advocate General informs the Court that an Officer belonging to H.P.P.S. cadre, cannot be continued against the post belonging to Indian Police

Service Cadre as for this purpose, special permission is required to be sought. He further submits that while issuing the said order, the Government has taken into consideration the place of posting of the husband of the private respondent, being a couple case.

5. Learned Advocate General, by referring to Annexures R-7 and R-8, appended with the reply, further submits that now, in fact, petitioner has been ordered to be posted as Commanding Officer, Home Guards at Mandi, keeping in view the fact that petitioner is on the verge of superannuation and has fixed the marriage of his daughter and that he happens to be the permanent resident of Jogindernagar, District Mandi. On these counts, it is prayed on behalf of the State that there is no merit in the petition and the same is liable to be dismissed.

6. By way of rejoinder, petitioner has refuted the contentions so raised by the State. As per the petitioner, the stand of the State that petitioner could not be continued at Jungle Beri for the reason that he happens to be an Officer of H.P.P.S. Cadre, is totally misconceived, because there are innumerable examples where Officers belonging to H.P.P.S. Cadre, have been appointed and called upon to serve against the posts, which otherwise are to be manned by Indian Police Service Cadre for substantive period.

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

8. Primarily, the grievance of the petitioner is with regard to his being transferred, vide Annexure P9, from Jungle Beri to Kullu as Commandant Home Guards. No doubt, this transfer was effected by the State within two months from the date of his posting at Jungle Beri. Though, it is correct that the assurance of minimum tenure of 3 to 5 years in terms of the Transfer Policy of the respondent-State, is not available to Class-I Officers, yet, this Court wants to make the observation that frequent transfers even of Class-I Officers are neither in the interest of administration nor the employee.

9. Be that as it may, coming to the facts of the present case, when the petitioner was ordered to be transferred from Junga to Jungle Beri, this transfer order was also made by the respondent-State within about four months and the petitioner being posted at Junga. However, the petitioner did not object to the same because it appears that he was satisfied with the place where he was ordered to be posted and the Court is not finding any fault with this satisfaction of the petitioner.

10. As noted above, the main contention of learned counsel for the petitioner vis-à-vis the legality of notification, Annexure P9, is that the same has been issued in violation of the provisions of Section 12 of the H.P. Police Act, 2007, read with Section 56 thereof.

11. I will first deal with Section 56 of the H.P. Police Act, 2007. Section 56 of the said Act, *inter alia*, envisages that there shall be a State Police Establishment Committee headed by the Director General of Police and comprising of four senior police officers not below the rank of Inspector General of Police, to be nominated by the Director General of Police and said Committee shall be responsible for the acts which are mentioned in the said Section, which, *inter alia*, includes the recommendation of proposals for postings and transfers of Gazetted Police Officers to the State Government subject to provisions of the Act and relevant Rules.

12. Annexure P9 is a notification, which has been issued by the Chief Secretary to the Government of Himachal Pradesh. Though, it has been contended by the petitioner that this transfer is in violation of Section 56 of the Act, however, no material has been placed on record by the petitioner to demonstrate that the transfers, which have been effected by the State Government, vide Annexure P9, were without necessary recommendations of the Committee, as is envisaged under Section 56 of the Act, 2007. The reason as to why the Court is shifting the onus upon the petitioner to prove this fact is because it is the basic principle of law that he who alleges has to prove. As it is the allegation of the petitioner that transfer has been effected by violating the provisions of Section 56 of the Act, 2007, the Court cannot throw the onus upon the State Government to demonstrate that provisions of Section 56 of 2007 Act, were complied with. To the contrary, it was for the petitioner to have had gathered relevant information, may be under the Right to Information Act, to demonstrate that there was a violation of Section 56 of 2007 Act. In the absence of there being any such material on record, inference to the contrary has to be drawn. It is relevant to mention, at this stage itself, that Annexure R-7 appended with the reply, otherwise also demonstrates that the Committee, as is envisaged under Section 56 of 2007 Act, undertook the relevant exercise by making recommendation to the Government, before the issuance of notification Annexure P9.

13. Now, coming to Section 12 of 2007 Act, in my considered view, the provisions of this Section are also not attracted in the peculiar facts of this case. Section 12 of 2007 Act, *inter alia*, provides that an Officer posted as Station House Officer, Sub-Divisional Police Officer or as Superintendent of Police of a District, shall normally have minimum tenure of two years and maximum tenure of three years, unless promoted to a higher post earlier. It is further

provided in the said Section that any Officer may be removed from his post before expiry of minimum tenure of two years by the authority competent to do so for the reasons to be recorded in writing, consequent upon the exigency which stands contemplated in this statutory provision itself.

14. In the present case, petitioner was not holding the post of Superintendent of Police of a District at the time when the impugned transfer order was passed. Simply because the petitioner happens to be an Officer of the rank of Superintendent of Police, this does not confers any protection upon the petitioner as envisaged under Section 12 of 2007 Act. This, I say so for the reason that Section 12 of 2007 Act, opens with words "an Officer posted", meaning thereby that this protection is extendable only to those Officers, who actually are posted either as Station House Officer, Sub-Divisional Police Officer or Superintendent of Police of a District. In other words, a person, who otherwise may be holding a post equivalent to said posts, is not entitled to protection under Section 12 of 2007 Act. Therefore, I hold that petitioner is not entitled for any protection, as is envisaged under Section 12 of 2007 Act.

15. Now, addressing the contention of the petitioner that the impugned transfer order has been passed not on account of any administrative exigency or in public interest, but to adjust private respondent only, a perusal of impugned notification demonstrates that private respondent, who was serving as Commandant at 1st IRBn Bangarh, District Una, vide said order was posted as Commandant, 4th IRBn, Jungle Beri, in place of the petitioner. Jungle Beri happens to be in District Hamirpur and husband of private respondent, who was serving as Superintendent of Police, District Una, vide the same notification, has been ordered to be transferred as Superintendent of Police Hamirpur, H.P. A perusal of the transfer order does not demonstrates that Ms. Sakshi Verma (private respondent) was transferred from Bangarh (Una) to Jungle Beri (Hamirpur) on her request. This, I say for the reason that generally in case an Officer is posted at a particular station on his or her request, then the transfer is without TTA, but there is no such reflection in the transfer order that private respondent was being transferred from Bargarh to Jungle Beri, without TTA.

16. Now, because it is the contention of the petitioner that transfer order was on extraneous consideration, rather than on administrative exigency and in public interest, again onus is upon the petitioner to have demonstrated this fact. By simply making a bald assertion to this effect, it cannot be said that petitioner has been able to discharge his obligation in this regard. Even otherwise, taking into consideration the fact that husband of private respondent is also an IPS Officer, in case the Department has made an endeavour to ensure that they are

posted at places which are adjacent to each other, the Court cannot not find any fault with the said act of the State as it is inconsonance with the Transfer Policy of the State Government to post couples at places nearer to each other. Therefore, this Court does not concurs with the submissions of the petitioner that the impugned transfer order has been passed on account of any extraneous reasons at the behest of private respondent, rather than in public interest or administrative exigency.

17. Further, now, keeping in view the fact that after issuance of notification, Annexure P9, vide which the petitioner was ordered to be transferred to Kullu, as the petitioner stands accommodated at Mandi, which place is hardly situate at a distance of 50 Kms. from the home station of the petitioner, which is at Jogindernagar, therefore, also in my considered view, petitioner cannot have any grouse in this regard.

Accordingly, in view of the observations made hereinabove, as this Court does not finds any merit in this petition, same is dismissed, so also pending miscellaneous application(s), if any.

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

Kulwant Singh

....Petitioner.

Versus

State of Himachal Pradesh and others

....Respondents.

CWP No.2039 of 2017
Decided on: 13.10.2020

Constitution of India, 1950- Article 226**-** Seeking direction to respondents to grant in Aid to the petitioner- restraining the respondents from dispensing his services till his regularization- Held- The claim of petitioner to allow him to continue as computer teacher to release PTA-Grant in-Aid does not survive- In year 2005- Petitioner was attained by PTA of school to impart education to students in a subject which never stood introduces in the school- After the school was granted –One post of information practices sanctioned in year 2013- Sh Vishal was appointed through proper process- After joining of Sh Vishal the PTA did not impart computer education to student despite the fact that there was no subject of computer education in school- Services of petitioner were not engaged by PTA on account of act if opinion of the education department of not appointed a teacher to impart education to the student in a subject duly introduced in the school- Petitioner has not right to claim grant –In-Aid from court- Because his appointment as Teacher to impart computer education by the PTA of school was testing tortuous an unintended act at the behest of PTA of govt can not be burdened to release the grant in aid((Paras 6, 7, 8).

For the petitioner: Mr. T.S. Chauhan, Advocate.

For the respondents: Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(oral)*

By way of this petition, the petitioner has, inter alia, prayed for the following reliefs:-

(i) *"That the impugned rejection order contained in Annexure P-11 dated 3.4.2017 may kindly be quashed and set aside.*

(ii) *That the respondents may kindly be directed to consider the case of the petitioner for regularization in the same capacity under which he is working since 2005 with all consequential benefits.*

(iii) *That the case of the petitioner may kindly be considered in the light of judgment passed by this Hon'ble Court.*

(iv) *That further the respondents may be directed to grant in aid to the petitioner and further the respondents may be restrained from dispensing of the services of the petitioner till his regularization.*

(v) *That further the respondents may also liable to forward the case of the petitioner for regularization within time bound period as provided in the policy for grant in aid."*

2. The case of the petitioner is that he was initially appointed as Computer Teacher in the then GHS Tatehal, District Kangra, H.P., on 03.06.2005, vide Annexure P-1, referred to in the petition as GSSS Tatehal as subsequently the School was upgraded. His salary was Rs.1,000/- per month. He continued to serve, as such, till the month of March, 2013, when his services were dispensed with on the appointment of regular incumbent. His contention is that he has a right to be regularized against the post in issue and he also has a right to be received grant-in-aid by setting aside the impugned rejection order dated 03.04.2017.

3. Though, during the course of arguments, learned counsel for the petitioner has not pressed the relief for regularization, however, he has argued that as the petitioner served in the School after he was appointed by the Parents Teachers Association in the School concerned against the post of Computer Teacher, the act of denying grant-in-aid to him from 03.06.2005 till he served as such, is arbitrary and accordingly, learned counsel has submitted that this writ petition be allowed by directing the respondents to pay grant-in-aid to the petitioner for the period, he served as Computer Teacher.

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

5. The petitioner had earlier approached this Court by way of CWP No.1686 of 2014, which was disposed of, vide order dated 15.6.2016, in the following terms:-

3. "It is not in dispute that the petitioner initially was appointed as Computer Teacher on 3.6.2005, but was thereafter teaching Information and Technology, Math and Science to the higher classes and continued to work such uptill 19.7.2013 and therefore, has vast experience of teaching.

4. Undoubtedly, the petitioner on joining of a regular hand can have no grievance against the regularly selected candidate, but then his teaching experience should also not go waste. Therefore, taking into consideration the entire facts and circumstances of the case, in the event of there being available a post for which the petitioner is duly qualified, the respondents shall consider his case on preferential basis by giving due weightage to his working experience.

The petition stands disposed of in the aforesaid terms, so also the pending applications, if any, leaving the parties to bear their costs."

6. Thereafter, in compliance to the order so passed by this Court, the competent authority passed order dated 3rd April, 2017, Annexure P-11, vide which the claim of the petitioner has been partially rejected by the competent authority in the following terms:-

3. "In compliance to the order passed by the Hon'ble Court the petitioner was called for personal hearing on 28.03.2017 vide this Directorate letter No.EDN-H(18) LC-COPC 59/2016 Kangra dated 20th March 2017 and the petitioner attended the personal hearing on 28.03.2017. The petitioner was heard at length and he contended that he was engaged by the Parents Teacher Association (PTA) of Govt. High School, Tatehal, District Kangra vide resolution No.62 dated 07.05.2005 to impart computer education to the school students on local PTA fund and his services were subsequently terminated after joining of company based teacher.

4. The Principal, Govt. Sr. Sec. School Tatehal, District Kangra produced the record through a lecturer of the concerned school and informed that the Computer Education was not a introducing subject in Government High School, Tatehal in the year 2005 and the PTA of the concerned school, appointed the petitioner to teach Computer Subject to the students of class 9th and 10th classes. The remuneration was also paid by the concerned PTA to the petitioner. He further informed that the post of Information Practices Teacher in Government Sr. Sec. School, Tatehal, District Kangra was sanctioned by the department in the year 2013 and Mr. Vishal Bhardwaj was appointed by the department/company through proper process. He has joined against the sanctioned post on 19.07.2013 and still working against the post. After joining of Sh. Vishal Bhardwaj the concerned PTA did not allow the petitioner to work.

5. I have carefully gone through the record pertaining to the case and heard the petitioner. The establishment of IT teachers is dealt with by the Director of Higher Education and in Elementary Education IT is not an introducing subject. The petitioner further contended that on joining of a regular hand he has no grievance but his experience for teaching computer education to 9th and 10th classes

may be taken into consideration and he may be adjusted in the same school against some other post.

Keeping in view of the facts and circumstances of the case explained herein above the claim of the petitioner to allow him to continue as computer teacher and to release PTA grant-in-aid does not survive, due to the reasons that PTA appointments are made by the concerned Parents Teachers Association and the petitioner is at liberty to make sincere efforts at his own level as and when the post of IT teacher is advertised by the PTA wherever any vacancy of IT teacher exists."

7. In my considered view, the order so passed by the competent authority is a just order and it is also self-explanatory as to why the petitioner is not entitled for grant-in-aid. Here is a case where in the year, 2005, petitioner was appointed by the PTA of the School concerned to impart education to the students in a subject, which never stood introduced in the School. Thus though there was no subject of Computer Education in the School, yet, the PTA of the School in its wisdom decided to appoint the petitioner to impart education to the students for the subject of Computer Education. After the School in issue was upgraded, the Department of Education sanctioned one post of Information Practices Teacher in GSSS Tatehal, District Kangra, which was done in the year, 2013, and one Shri Vishal Bhardwaj stood appointed through proper process to impart education to the students in the said subject. After joining of the said Shri Vishal Bhardwaj, PTA did not allow the petitioner to function.

8. Therefore, in these circumstances, when admittedly, the services of petitioner were not engaged by the PTA on account of the act of omission of the Education Department of not appointing a Teacher to impart education to the students in a subject duly introduced in the School curriculum, petitioner has no right to claim grant-in-aid from the Government, because his appointment as Teacher to impart education in Computer Education by the PTA of the School, was totally fortuitous, an unilateral act at the behest of PTA, and the Government cannot be burdened to release the grant-in-aid to the petitioner for this unilateral act of the PTA concerned.

In view of the observations made hereinabove, as there is no merit in this petition, the same is accordingly dismissed. Pending miscellaneous application(s), if any, stand disposed of.

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

State of Himachal Pradesh and others ...Petitioners.

Versus

Sunita Pandey and others ..Respondents.

CWP No. 597 of 2019.
Judgment reserved on: 08.10.2020.
Date of decision: 13.10.2020

Constitution of India, 1950- Article 226- Respondents engaged as Para-Lectures in Psychology in 2003- Subjects of Psychology or Philosophy declared as dying cadre in 2010- Recruitment and Promotion Rules for the post of Post Graduate Teachers (PGT's) amended and subjects of Psychology not included- Para Lecturers in the posts of Psychology (respondents) regularized as TGT's instead of PGT's on 19.1.2015- Administrative Tribunal allowed CWP filed by respondents and were regularized as PGT's- Challenge thereof-Held, that Para lectures appointed under the policy constitute a homogenous class –Classification based on subject of Psychology, Electronics and Home Science as dying cadre is in violation of Article 14 of Constitution- No intelligible differentia to exclude the respondents for not appointing as PGT's –One Para lecture Sh. Ghanshyam, regularized as PGT in Electronics which was also dying cadre- No illegality in the order of Tribunal- Petition dismissed. (Paras 13, 14, 15 & 18)

For the Petitioners : Mr. Vikas Rathore, Mr. Vinod Thakur, Mr. Shiv Pal Manhans, Additional Advocate Generals, Ms. Seema Sharma, Mr. Bhupinder Thakur and Mr. Yudhbir Singh Thakur, Deputy Advocate Generals.

For the Respondents: Mr. Sanjeev Bhushan, Senior Advocate with Mr. Rajesh Kumar, Advocate.

(THROUGH VIDEO CONFERENCING)

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This writ petition is directed against the order of the Himachal Pradesh Administrative Tribunal, Shimla (for short 'Tribunal') dated 01.10.2018 whereby the petition filed by the respondents came to be allowed.

2. The facts are not in dispute. The respondents were engaged as Para Lecturers in the year 2003 against the post of Psychology under the Para Teacher Policy 2003.

3. On 30.09.2010, the State Government declared the subjects of Psychology and Philosophy as dying cadre. 4. Thereafter, on 19.08.2011, the recruitment and promotion rules for the post of Post Graduate Teachers (PGTs) were amended and the subjects of Psychology, Home Science and Electronics were not included in these rules.

5. The State Government on 06.08.2013 issued instructions to take over the services of PTAs on contract basis and to regularize the services of Para Lecturers after completion of 10 years.

6. Accordingly, vide order dated 18.12.2014 the services of Para Lecturers, who had completed 10 years of service in different subjects were regularized except those who were engaged against the posts of PGT Psychology, Home Science and Electronics as these were declared as dying cadre posts.

7. On 03.01.2015, the State Government directed that the services of the Para Lecturers working on the posts of Psychology, Home Science and Electronics be regularized as Trained Graduate Teachers (TGTs) instead of PGTs and accordingly the respondents were regularized as TGTs on 19.01.2015.

8. The respondents assailed this action by filing CWP No. 1259/2015 before this Court, however, on the reopening of the Tribunal, the same was transferred to the Tribunal and assigned T.A. No. 21/2017 and contained the following prayers:

> "(I) That an appropriate writ, order or directions may kindly be issued and clause-c of annexure P-2 may kindly be quashed and set aside in the interest of law and justice.
>
> (II) That a writ in the nature of mandamus may kindly be issued and the respondents may kindly be directed to regularize the services of the petitioners as PGTs, Psychology by modifying annexure P-3.
>
> (III) That further a writ in the nature of mandamus may kindly be issued and the respondents may kindly be directed to pay scales of PGTs to the petitioners from the date such scale has been made available to the similarly situated persons w.e.f. 18.12.2014 with all consequential benefits by posting the petitioners in the same schools/institutions where they were teaching and performing their duties."

9. The Tribunal vide order dated 01.10.2018 allowed the petition and quashed clause-c of the notification dated 03.01.2015 and directed the petitioners to regularize the services of the respondents as PGTs on completion of 10 years of service with effect from 18.12.2014 along with all consequential benefits.

10. It is vehemently argued by the learned Additional Advocate General that the order passed by the Tribunal is not at all sustainable in the eyes of law as it has failed to take into consideration the instructions issued by the Government from time to time and further failed to take into consideration the fact that the entire matter of PTAs, PATs and Para Lecturers taking over their services on contract basis and regularization of their services is *sub-judice* before the Hon'ble Supreme Court.

11. On the other hand, Shri Sanjeev Bhushan, Senior Advocate, assisted by Shri Rajesh Kumar, Advocate, for the respondents, would state now that the matter in Chander Mohan Negi's case stands decided by the Hon'ble Supreme Court, the petitioners cannot file this petition solely on the basis of the self-serving instructions issued by them from time to time.

Lastly, it was contended that one Ghanshayam Singh who was also not regularized as PGT being a Para- Lecturer in the subject of Electronics (which was also declared dying cadre vide Annexure P-2 at page 38 of the TA No.21/2017) after the judgment passed in favour of the present respondents, filed a Civil Writ Petition bearing No. 2638/2019, however, during the pendency of his Civil Writ Petition which was tagged along with the present Writ Petition, respondents regularized his services as PGT vide an office order dated 4th July, 2020 with effect from 03.01.2015.

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

13. At the outset, it needs to be observed that the main plank of argument of the petitioners to resist the claim of the respondents was the pendency of Chander Mohan Negi's case before the Hon'ble Supreme Court which now stands decided vide judgment dated 17.04.2020. The Hon'ble Supreme Court dismissed the petitions that were preferred against the judgment rendered by a learned Division Bench of this Court, of which one of us (Justice Tarlok Singh Chauhan) was a member, in batch of appeals, the lead being LPA No.504 of 2012 that was allowed on various grounds viz:

> "5. Aggrieved by the order of the learned Single Judge dated 18.10.2012 passed in C.W.P. No.3303 of 2012-A, the affected/aggrieved parties, individual teachers, Association of Primary Assistant Teachers, and the State of Himachal Pradesh have filed Letters Patent Appeals. The said appeals were heard along with the writ petitions wherein appointment of teachers under the other two schemes, namely, Para Teachers Policy of 2003 and the Himachal Pradesh Gram Vidya Upasak Scheme of 2001 was under challenge. By common impugned judgment dated 09.12.2014 Division Bench of High Court has allowed the Letters Patent Appeals by setting aside the order of the learned Single Judge and dismissed the writ petitions which were clubbed along with the Letters Patent Appeals. The Division Bench has allowed the Letters Patent Appeals on various grounds, viz.:
>
> > Though the appointments were made during the year 2001 and 2003, writ petitions were filed belatedly in the year 2012 and 2013 and the writ petitioners in C.W.P. No.3303 of 2012 were not even qualified when the appointments were made;
> >
> > No one has questioned the selection of teachers under the Schemes at the relevant point of time, writ petitions were filed after 11 years of their appointment and the writ petitioners have not filed any rejoinder controverting the plea of the State as stated in para 11 of the reply filed in the writ petition and the State had made such appointments by framing the policies when the qualified teachers were not available for making appointments, such appointments made under various schemes cannot be termed as illegal;

> In view of the long service rendered by them it is always open for the State to regularise their services;
>
> State has sufficiently explained giving the background of such appointments of the teachers in various categories and the material placed by the State disclosed that a large number of posts were vacant in the cadres of TGTs, C&Vs, PTAs etc.;
>
> A large number of vacancies are still available as the writ petitioners have claimed interest such pleas cannot be entertained to treat the writ petitions as the public interest litigation and the appointees are not even made party respondents, and no material is placed to show that all the appointees are members of the Association which was impleaded as the third respondent in the writ petition etc."

14. Adverting to the other ground regarding judgment of the Tribunal being in violation by ignoring the relevant instructions, we would first notice the reasoning given by the Tribunal for allowing the petition which is contained in para-5 of the order which reads as under:

> "5. However, the fact of the matter is that the Government has taken policy decision to regularise the service of Lecturers appointed under Para Teachers Policy 2003 as PGTs. Services of the Lecturers except subject to Psychology/Electronics/Home Science, have been regularised as PGTs. Instructions dated 18th December, 2014, Annexure P-1, did not stipulate any such deviation in regularizing the services in the subject of Psychology/Electronics/Home Science. The action of the respondents to regularise the services of the applicants as TGTs was arbitrary, discriminatory and is violative of articles 14 and 16 of the Constitution of India. Consequently, Clause (c) of Annexure P-2, dated 3rd January, 2015, is quashed and the respondents are directed to regularise the service of the applicants as PGTs on completion of 10 years service on and with effect from 18th December, 2014 with all consequential benefits within two months on production of the certified copy of this order by the applicant."

15. No illegality much less any perversity can be found in the reasoning accorded by the Tribunal. In addition thereto, it cannot be denied that Para Lecturers, who were appointed under the policy, constitutes a homogeneous class and, therefore, it was not permissible for the petitioners to divide a homogeneous class that too solely on the basis that the State had declared the subjects of Psychology, Electronics and Home Science as dying cadre. The classification being not based on any discernible rational principle and being wholly unrelated to the objects sought to be achieved violates Article 14 of the Constitution. It is more than settled that a homogeneous class cannot be divided by arbitrarily fixing an eligibility criteria unrelated to the purpose.

16. Article 14 of the Constitution of India ensures to all equality before law and equal protection of laws. At this juncture, it is also necessary to examine the concept of valid classification. A valid classification is truly a valid discrimination. It is true that Article 16 of the Constitution of India permits a valid classification. However, the classification must be based on a just objective. The result to be achieved by the just objective presupposes the choice of some for differential consideration/treatment over others. A classification to be valid must necessarily satisfy two tests. Firstly, the distinguishing rationale has to be based on a just objective and secondly, the choice of differentiating one set of persons from another, must have a reasonable nexus to the objective sought to be achieved. The test for a valid classification may be summarised as a distinction based on a classification founded on an intelligible differentia, which has a rational relationship with the object sought to be achieved. The State cannot arbitrarily pick and choose from amongst similarly situated persons, a cut-off date for extension of benefits especially pensionary benefits. There has to be a classification founded on some rational principle when similarly situated class is differentiated for grant of any benefit.

17. The learned Additional Advocate General for the petitioners has failed to point out any intelligible differentia to exclude the respondents for not appointing them as PGTs and appointing them to a lower posts of TGTs.

18. Once, the petitioners themselves regularized the services of Ghanshayam Singh (supra) Para Lecturer as PGT in the subject of Electronics, which too was a dying cadre, then the same benefit cannot be denied to the respondents or else it would be a case of invidious discrimination. The action of the petitioners making any distinction between the members of the same class that too without any rational basis is hit by the doctrine of invidious discrimination and amounts to gross arbitrariness and is thus not sustainable in the eyes of law.

19. For the reasons stated above, we find no merit in this writ petition and the same is accordingly dismissed, so also the pending application(s), if any.

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

1. **Cr.M.P.(M) No. 902 of 2020**

Navjot Singh ...Petitioner.

Versus

State of Himachal Pradesh ..Respondent.

2. **Cr.M.P.(M) No. 982 of 2020**

Manjeet Singh ...Petitioner.

Versus

State of Himachal Pradesh ..Respondent.

Cr.M.P(M) Nos.902 & 982 of 2020
Reserved on: 05.10.2020
Date of Decision: October 12, 2020

Code of Criminal Procedure, 1973- Section 439- Petitioners seeking regular bail in Case FIR NO. 271 of 2017 P.S Paonta Sahib under sections 147, 149, 332 & 307 and Section 25 Indian Arms Act- Petitioners in judicial custody since July 2017 and case pending for prosecution evidence- Whereas one co-assessed enlarged on bail- Held, that bail petition of petitioner Manjeet Singh was rejected by Hon'ble Supreme Court on the ground that case is at an advance stage of trial- No justifiable or plausible reason exist to enlarge the petitioners on bail at this stage- Petition dismissed. (Paras 7, 14 & 15)

For the Petitioner(s): Mr.Raja Paramdeep Saini and Ms.Garima Kuthiala, Advocates, for the petitioner in Cr.M.P.(M) No.902 of 2020, through Video Conferencing.

Mr.Sanjeev K. Suri, Advocate, for the petitioner in Cr.M.P.(M) No.982 of 2020, through Video Conferencing.

For the Respondent: Mr. Desh Raj Thakur, Additional Advocate General, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

These petitions, preferred under Section 439 of Cr.P.C., seeking grant of regular bail to the petitioners in case FIR No.271 of 2017 dated 07.06.2017, registered in Police Station Paonta Sahib District Sirmaur H.P. under Sections 147, 149, 332, 353 and 307 of the Indian Penal Code (hereinafter referred to as 'IPC' in short) and Section 25 of the Indian Arms Act, are being decided by this common judgment.

2. Petitioners, after remaining in police custody, are in judicial custody since July 2017. Main challan was presented in the trial Court on 30.08.2017, whereas, supplementary challan was presented on 01.12.2017. Now case is fixed for recording of evidence of PWs at Sl.No.13,14 and 16 on 19.11.2020 and PWs at Sl.No.17, 20, 21 and 24 on 20.11.2020. It is also stated in the status report that petitioner Navjot Singh was found involved in three other criminal cases i.e. FIR No.295 of 2005 dated 05.12.2005 registered under Section 307 IPC in Police Station Kharar District Mohali; FIR No.32 of 2011 dated 11.04.2011 registered under Sections 326, 324, 323, 506, 356, 427, 148 and 149 IPC in Police Station Mullapur, Garibdas Mohali; and FIR No.54 dated 25.05.2012 registered under Sections 302, 341, 327, 506, 149 and 120B IPC in Police Station Mator District Mohali and petitioner Manjeet Singh has been found

involved in FIR No.79 of 2017 dated 01.06.2017 registered under Sections 307 IPC and Section 25 of the Arms Act in Police Station Mauli Jagran Chandigarh.

3. On the basis of material placed before me, in present bail petitions, it is apparent that Navjot Singh (petitioner in Cr.M.P.(M) No.902 of 2020) had also approached High Court by filing Cr.M.P.(M) Nos.267 of 2018 and 985 of 2018, but those petitions were dismissed, by a Coordinate Bench, as withdrawn on 16.04.2018 and 20.08.2018, respectively, with liberty to the petitioner to file afresh. Thereafter, Navjot Singh had again preferred Cr.M.P.(M) No.1017 of 2019, which was also dismissed on 24.06.2019 by the Coordinate Bench as withdrawn at that time, by taking note of the fact that bail petitioner was behind the bars for two years and by that time only two prosecution witnesses out of 20 had been examined, the Coordinate Bench had hoped and trusted that the Court below would make all out efforts to conclude the trial expeditiously, preferably on or before 31.12.2019. It was also observed that otherwise also, on judicial and administrative sides, this Court has been repeatedly advising the Courts below to take up the cases of under-trials on priority basis, so that their liberty is not curtailed for an indefinite period, if they are ultimately found to be innocent.

4. Co-accused Gurjaipal Singh had also preferred bail application being Cr.M.P.(M) No.1628 of 2018, which was dismissed on 11.01.2019. At that time, his bail application was rejected on the ground that *prima facie* it had come on record that he was actively participating with the hardcore criminals, who even do not care for the consequences of using of fire arms. Therefore, at that stage, when only one witness had been examined, enlargement of the petitioner on bail was not considered in the interest of justice as plea of the petitioner, at that time, that victim and material witnesses, being officials could not be dissuaded or terrorized, was rejected for the reason that despite knowing that complainant was performing his duty as a police official/officer, the bullets were shot upon him on a highway on the barrier.

5. Thereafter co-accused Gurjaipal Singh was enlarged on bail by this Court vide order dated 24.10.2019, passed in Cr.M.P.(M) No.1480 of 2019. Learned counsel for petitioner Navjot Singh has referred observation of this Court, which reads as under:-

> "4. In status report dated 28.09.2019, detailed particulars of listing of dates, when trial was listed for examining witnesses, has been given, perusal thereof reveals that at initial stage, examination of the witnesses was postponed on account of applications filed by the co-accused. However, after 03.08.2018, case was listed for examination of witnesses w.e.f. 23.10.2018 to 27.10.2018, but on that date, witnesses referred by the accused in their application filed under Section 91 of Cr.P.C., could not be summoned inadvertently. The said dates are not relevant as after that bail application preferred by the petitioner was

rejected on 11.01.2019. Thereafter, case was listed for examining prosecution witnesses in April 2019 on 18.04.2019, 19.04.2019 and 20.04.2019, but on 18.04.2019, PW Rajinder Kumar, complainant, was not present and as such, recording of statement of the witnesses was deferred and the said witness, complainant, was examined on 03.05.2019. Thereafter, case was listed for recording of evidence on 17.05.2019, but on that date, accused were not produced on the ground that Police Force was not available for deployment in Lok Sabha Elections and as such, case was adjourned for 06.07.2019 for recording of the evidence, but on that date, no witness was present, which constrained the Court to issue bailable warrants against witnesses No.6, 7, 8 and 10, who are none but the official witnesses as witnesses No.6, 7 and 8 are officials in the Police Department/Home Guard and witness No.10 is Clerk in Transport Department (RTO Office). On the next date, fixed for for examining these witnesses i.e. 21.09.2019, only one witness i.e. Constable Inderjeet was present, but he was given up and bailable warrants were again issued against remaining witnesses.

6. In the facts narrated supra as revealed from the status report filed on behalf of the respondent-State, it is evident that recording of the statements of the witnesses is being delayed for laxity on the part of the prosecution as the witnesses against whom trial Court has been constrained to issue bailable warrants are none but the official witnesses serving in the Police Department/Home Guard/Transport Department and further that petitioner is behind the bars since July 2017 and in case prosecution case is taken to be as it, he appears to be the first offender in the case as at the time of commission of alleged offence, he was 23 years of age and at that time, unlike other co-accused, he has not been found to be involved in any other case. Therefore, case of the petitioner altogether is different from his co-accused, namely, Navjot Singh, Surmukh Singh and Manjit Singh, and therefore, it can be considered on different footings. It is also the fact that statement of the complainant, who is victim in the present case, has also been recorded as PW.2 on 03.05.2019. Considering entire facts and circumstances as well as status of the petitioner which is different from his co-accused and also considering the fact that petitioner has undertaken to furnish local surety on his behalf, I find that at this stage, he is entitled for bail as purpose of the bail is to ensure presence."

6. After grant of bail to co-accused Gurjailpal Singh, Manjeet Singh (petitioner in Cr.M.P.(M) No.982 of 2020) had also approached this Court by filing Cr.M.P.(M) No.2031 of 2019 for enlarging him on bail on the ground of parity with co-accused Gurjaipal Singh. This petition was dismissed by this Court vide order dated 21.11.2019, on the ground that there may

be similarity of certain facts, however, contrary to the circumstances related to Gurjaipal Singh, petitioner-Manjeet Singh was found to be involved in another case and plea of the petitioner that he had been acquitted in the said case was also not considered helpful to him for the reason that he had been acquitted of the charges by giving benefit of doubt, but not on the ground that he was not involved in that case.

7. Aforesaid order dated 21.11.2019 was assailed by petitioner Manjeet Singh in the Supreme Court by filing Special Leave to Appeal (Crl.) No.11794 of 2019. The Supreme Court at the time of disposing of that Special Leave to Appeal vide order dated 24.01.2020, though, had expressed its disagreement with the view of this Court on both issues, on which bail petition of petitioner Manjeet Singh was rejected, however, after hearing case on merits and after perusing the evidence, including statement of injured Constable recorded in the Court, without expressing view on merits of the case, had refused grant of bail at that stage on the ground that case was at an advance stage of trial. Operative portion of order passed is as under:-

> "We, therefore, heard the case on its own merits after perusing the evidence including statement of the injured constable recorded in the Court. Since the case is at an advance stage of trial, we do not express any view on the merits of the case but we feel that bail cannot be granted at this stage."

8. Learned counsel for the petitioners have pointed out that after refusal by the Supreme Court to grant bail, matter was listed for recording evidence of prosecution on 29.02.2020 and 07.03.2020 and on 29.02.2020, against five summoned witnesses, only two witnesses were present and they were examined. Whereas, on 07.03.2020 against four summoned witnesses, only two witnesses were present and they were also examined. Thereafter, trial was fixed for recording of evidence of PWs at Sl.No.13, 14 and 16 on 03.06.2020 and PWs at Sl.No.17, 20, 21 and 24 on 04.06.2020, however because of circumstances prevailing, on account of COVID-19 pandemic, trial Court had postponed recording of evidence for 11.08.2020 and 13.08.2020 respectively but even on 11.08.2020 and 13.08.2020 no evidence was recorded and matter has been adjourned for 19.11.2020 and 20.11.2020 respectively for effective hearing.

9. It is also pointed out that, as noted by Court earlier also, witnesses are not being produced by the prosecution on the dates fixed by the trial Court, which is causing delay in the trial, resulting into serious prejudice to the personal liberty of the petitioners and further that despite passing of order by a Coordinate Bench of this Court expecting from the trial Court to make all out efforts to conclude the trial expeditiously, preferably on or before 31.12.2019, no serious efforts are being made by the prosecution and the trial Court to conclude the trial at the

earliest and since last three years during pendency of the trial, out of 29, only 12 witnesses have been examined despite the fact that all the witnesses are official witnesses.

10. It is also submitted by learned counsel for the petitioner Navjot Singh alternatively, that in case it is not found favourable by the Court to enlarge the petitioners on bail, at this stage, then in view of the snail pace progress of the trial, a time bound direction to complete the recording of evidence and conclude the trial be issued especially keeping in view the issue of personal liberty of petitioners as guaranteed under Article 21 of the Constitution of India.

11. Learned counsel for the petitioners have also submitted that in case trial is not completed in the time bound manner, as may be directed by this Court, petitioners may be given liberty to file fresh bail application(s).

12. So far as prayer of the petitioners to grant them liberty to file fresh applications is concerned, in my opinion, an accused has a right to file successive bail applications, as permissible under law, and no liberty of this Court is necessary for filing such bail application either in this Court or in the Court of Sessions Judge having jurisdiction to decide the same. Therefore, this option is always available to petitioners.

13. It is also noticeable that this High Court vide Order/Circulation dated 07.08.2020 has already resumed the work of recording the evidence in the Subordinate Courts.

14. In the given facts and circumstances, particularly in view of order passed by the Apex Court in Special Leave to Appeal, preferred by petitioner Manjeet Singh, I do not find any justifiable or plausible reason to enlarge the petitioners on bail, at this stage.

15. Accordingly, considering entire facts and circumstances of the case, including order passed by the Supreme Court as well as this High Court in petitions preferred earlier, and also submissions made by learned counsel for the petitioners, these petitions are dismissed but with a direction to the trial Court to ensure recording the evidence, at the earliest, preferably on or before 15.01.2021 and to conclude the trial as expeditiously as possible latest by 15.03.2021.

16. For concluding the trial in time bound manner the Trial Court is also directed to take all effective steps warranted for the purpose including preponing the date if considered viable and necessary and also to issue summons to the concerned witnesses, if not already issued, for next date(s) already fixed or preponed as the case may be, by issuing appropriate directions and taking necessary measures for doing the same, as deemed fit and appropriate by it. Statements of witnesses, which are possible through Video Conferencing, may also be recorded accordingly as per prescribed procedure and law. Parties, including prosecution, are also directed to ensure active cooperation to the trial Court including effective representations on their behalf before the trial Court on each date fixed and to be fixed for recording the

evidence and the dates subsequent thereto, fixed for further proceeding to conclude the trial so as to enable it to record the evidence at the earliest and conclude the trial as expeditiously as possible as directed supra. Parties are also expected to avoid unnecessary adjournments.

17. With disposal of petitions in aforesaid terms it is made clear that observations made in these petition(s) hereinbefore shall not affect the merits of the case in any manner and are strictly confined for the disposal of the bail application(s).

Registry to transmit a copy of this order to the trial Court through E-mail.

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

Akhil Kaushik ...Petitioner.

Versus

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

CWPOA No. 856 of 2019
Date of Decision: October 8, 2020

Constitution of India, 1950- Article 226- Petitioner claiming right of pensionary and ancilliary benefits after death of his father Dr. Arvind Kant Kasuhik being son of his second wife- Held, that as per rule 54(8) CCS (Pension) Rules , 1972, family pension shall be payable to widow or widower failing which to the eligible child- No right accrued to the petitioner for pensionary benefits before death of widow of deceased employee- Petition dismissed(Paras 3,5,6)

For the Petitioner: Mr.Prem P. Chauhan, Advocate, through Video Conferencing.

For the Respondents: Mr. Raju Ram Rahi, Deputy Advocate General, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (oral)

Petitioner herein is claiming right of pensionary and ancillary benefits in his favour, on account of death of his father Dr. Arvind Kant Kaushik, on the ground that he is son of second wife of deceased employee and uptill the age of 25 years, he is entitled for pensionary benefits on account of death of his father.

2. Learned Deputy Advocate General has placed on record instructions dated 15.09.2020, received from the Director Ayurveda, Himachal Pradesh, wherein it is stated that as per information given by deceased Dr.Arvind Kant Kaushik, with respect to his family, after his death, pension is being disbursed to his legally wedded wife Sunita Kaushik and she is drawing such family pension.

3. Undoubtedly, children may be entitled for pensionary benefits, but only in accordance with Rule 54 (8) of CCS (Pension) Rules, 1972, wherein it is provided that family pension shall not be payable to more than one member of the family at the same time and in case deceased/pensioner leaves behind a widow or widower, the family pension shall become payable to the widow or widower, failing which to the eligible child.

4. In present case, first legally wedded wife is alive as a widow of deceased Government servant/pensioner and, therefore, stage of devolving pensionary rights upon the child/children has not ripen yet.

5. Undoubtedly, family pension is also admissible to the children from void and voidable marriage, however, their right shall accrue in accordance with provisions of Rule 54 of CCS (Pension) Rules, only after death of legally wedded spouse.

6. In view of above, keeping all questions open, with respect to entitlement of the petitioner for the pensionary benefits after death of the widow getting pension, present petition is dismissed for having no merit with respect to claim of the petitioner at this stage.

7. Needless to say, in case any right accrues in favour of the petitioner, in future, he shall be entitled to claim the same, in accordance with law.

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

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

Jasmer Singh ....Petitioner.

Vs.

State of Himachal Pradesh and another .....Respondents.

CWP No. 1631 of 2020
Date of Decision: 07.10.2020

Constitution of India, 1950- Article 226- Petitioner regularized as a class-IV employee- Petitioner preferred objections to tentative seniority list of class-IV employees- Promotion of juniors to the post of Ayurvedic Pharmacist on the basis of tentative seniority list without deciding objections challenged- Held, that seniority of petitioner in first tentative seniority list as on 31.12.2010 was maintained by the department in the latest seniority list- No objections filed by petitioner to the first list- Accordingly, petition not maintainable and dismissed. (Paras 4, 5)

For the petitioner: Mr. Adarsh K. Vashista, Advocate.

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

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

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

> *"(i) That a writ in the nature of mandamus may kindly be issued directing the respondents to decide the objections submitted by the petitioner to tentative seniority list circulated by the Department as on 01.01.2018 and consequently allotting the appropriate seniority position to the petitioner in the final seniority list at par with the similarly situated persons and over and above his juniors, in the interest of justice.*
> *(ii) That the respondents may kindly be directed to consider the candidature of the petitioner for promotion to the next higher post of Ayurvedic Pharmacist from the date when similarly placed persons and persons junior to him have been promoted i.e. with effect from 20.3.2020 alongwith all consequential benefits, in the interest of justice."*

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

Petitioner claims to have been initially appointed as Class-IV employee on 08.06.1999 on daily wage basis. Thereafter, vide order dated 16.02.2009, his services were ordered to be regularized as such. The grievance of the petitioner primarily is with regard to the promotions of purportedly persons junior to him against the post of Ayurvedic Pharmacist w.e.f. 20.03.2020, on the ground that these promotions have been made on the basis of a Tentative Seniority list circulated by the department as on 01.01.2018, against which objections were filed by the petitioner, which were not decided by the competent authority.

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

4. It is not in dispute that as after regularization of the services of the petitioner as a Class-IV employee, the first tentative seniority list of Class-IV employees therein as it stood on 31.12.2010, was circulated by the department vide letter dated 12.01.2011 and thereafter vide letter dated 05.01.2012 as it stood on 31.12.2011, which were finalized also. On a pointed query put by the Court to learned counsel for the petitioner as to whether the petitioner had filed any objections to the said tentative seniority list, he has very fairly stated that no objections were filed by the petitioner to the said tentative seniority list. That being the case, in my considered view, this writ petition filed by the petitioner on the basis of tentative seniority list subsequently issued by the department, may be pertaining to Class-IV employees, is not maintainable. This I say so for the reason that each and every tentative seniority list which is

issued by the department, does not confers a right upon the party to submit objections against the same. It is the first tentative seniority list, after the incumbent is appointed against a post or promoted against a post, which is relevant and has to be objected to by the concerned officer or official, in case he is dissatisfied with his seniority position, as mentioned therein. There can be a situation wherein an incumbent is not aggrieved by the initial tentative seniority, but he is aggrieved by the subsequent seniority list, which may be so issued by the department. In those cases, the incumbents shall have a right to submit objections even to the subsequent seniority list. Coming to the facts of present case, here it is not the case of the petitioner that though he was satisfied with his seniority position as was in the initial seniority list, but the same was altered to his disadvantage subsequently. Here is a case where the seniority of the petitioner, as was reflected in the first tentative seniority list, as it stood on 31.12.2010, stood maintained by the department even in the latest tentative seniority list, to which the objections were filed by the petitioner. That being the case, as I have already observed above, the petition cannot be said to be maintainable, because when the petitioner was not aggrieved by the seniority as was assigned to him in the first tentative seniority list issued as far back as in the year 2011, then subsequent tentative seniority lists cannot be taken to confer a fresh cause of action to the petitioner.

5. In view of the observations made hereinabove, as this Court finds no merit in the present 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

Tek Singh Raghav .....Petitioner

Versus

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

CWP No.2734 of 2020
Reserved on: 6th October, 2020
Decided on: 9th October, 2020

Constitution of India, 1950- Article 226- Petitioner uploaded his online bid for the work "Providing lift Irrigation Scheme from River Beas to Pali vs. Silag" issued by respondents- Petitioner's technical bid rejected as similar works done by him earlier were of less value- Petitioner praying for quashing order rejecting his bid- Held, that terms and conditions in a bid document not challenged by petitioner which are specific and unambiguous- Not permissible for the petitioner to contend that his eligibility was required to be determined by the conditions in manual- Petition dismissed. (Para 5).

Cases referred:

Raunaq International Ltd. v. IVR Construction Ltd, (1999) 1 SCC 492;
Maa Binda Express Carrier v.NorthEast Frontier Railway, (2014) 3 SCC 760;

Shobikaa Impex (P) Ltd. V. Central Medical Services Society, (2016) 16 SCC 233,
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;
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
Raunaq International Ltd. vs. I.V.R. Construction Ltd. (1999) 1 SCC 492=1999 (1) Arb. LR 431 (SC).

For the Petitioner: Mr. Varun Rana, Advocate.

For the Respondents: Mr. Ashok Sharma, Advocate General with Mr. Vikas Rathore, Mr. Vinod Thakur & Mr. Shiv Pal Manhans, Additional Advocates General and Ms. Seema Sharma, Mr. Bhupinder Thakur & Mr. Yudhvir Singh Thakur, Deputy Advocates General, for respondents No.1 to 4-State.

(Through Video Conference)

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

Aggrieved against rejection of his technical bid and declaration of respondent No.5 as the lowest bidder,

petitioner has preferred the instant writ petition.

1 Whether the reporters of Local Papers may be allowed to see the judgment?
Facts:-

2(i). A Notice Inviting e-Tenders (in short 'NIeT') was issued by the respondents on 22.05.2020 for the work *'Providing lift Irrigation Scheme from River Beas to Pali & Silag Tehsil Padhar Distt. Mandi (HP). (SH:- Supply & Installation of Centrifugal Pumping Machinery at 1st stage, 2nd stage & 3rd stage*

with allied accessories and providing, laying, jointing, testing and carriage of MSERW pipe in Rising Main (Flanged with butt welding and C/o Thrust Block = 235 Nos.) with estimated cost of Rs.7,23,03,987/-'. The tenders were to be opened on 06.06.2020. The eligibility information with respect to Technical Bid was to be provided in Cover 1, whereas Cover 2 was to contain Financial Bid on the prescribed form. Clause 2 of the tender document pertaining to Cover 1 reads as under:-

"2. Cover 1 shall contain scanned copies of following "Eligibility Information" (Scanned copies to be uploaded).

i) *Earnest money: FDR of any nationalised bank/NSC/Saving Account of any Post Office of Himachal Pradesh duly pledged in the name of Executive Engineer IPH Division Padhar.*

ii) *The cost of tender form (Non-refundable) in shape of demand draft (Preferably non account payee) duly pledge in favour of Executive Engineer IPH Division Padhar Distt. Mandi (HP).*

iii) *Certificate of valid registration with HPIPH in appropriate class and latest renewal thereof.*

iv) *Income tax, GST and EPF valid registration as on date.*

v) *The contractor have to upload curve chart/Performance chart of pumping machinery being offered by them, failing which financial bid will not be opened.*

vi) *Scan copy of undertaking that I have carefully studies all the terms and conditions stipulated in the contract document before quoting the rates in the BOQ chart and also visited the sited of work before quoting the rates.*

vii) *Authorization letter regarding digital signature certificate (DSC) of the person authorized by the registered tenderer.*

viii) +- Average annual financial turn over during the last 3 year ending provision financial year should be at least 30% of the estimated cost.

ix) *Experience of having successfully completed* /commissioned similar work during last 7 year ending last day of the month previous to the one in which application are invited should be either of the following.

a. *Three similar completed works costing not less than the amount equal to 40% of the estimated cost. Rs.2,89,21,595/-.*

OR

b. *Two similar competed works costing not less than the amount equal to 50% of the estimated cost. Rs.3,61,51,994/-.*

OR

c. *One similar completed work costing not less than the amount*

equal to 80% of the estimated cost. Rs.5,78,43,190/-"

2(ii). Petitioner participated in the tender process under the terms & conditions of the tender document. He offered and uploaded his online bid on 05.06.2020. Seven technical bids including that of the petitioner were opened and scrutinized on 08.07.2020. Four participating bidders, i.e. respondents No.5 to 8 herein, were found satisfying the eligibility criteria as per the terms & conditions of the NIeT, hence, were held eligible for opening of financial bids. Petitioner's technical bid was rejected as the similar works done by him were found to be of less value and not meeting the requirements of NIeT. Petitioner was accordingly held ineligible for opening of his financial bid. On the recommendations of the Evaluation Committee, respondent No.4 on 09.07.2020 opened the financial bids of all eligible bidders. Respondent No.5 was found lowest amongst the successful bidders. Aggrieved, petitioner has preferred the instant writ petition, praying for quashing the order dated 08.07.2020, rejecting his technical bid and order dated 09.07.2020, whereby respondent No.5 has been held as the lowest bidder with further prayer to direct respondents No.1 to 4 to consider the petitioner as eligible bidder and to open his financial bid.

3. Contentions:-

Learned counsel for the petitioner contended

that**:-**

3(i). The respondents have wrongly rejected the technical bid of the petitioner on ground of less work done. The petitioner had claimed his eligibility for participating in the bid on the basis of following two similar completed works costing not less than the amount equal to 50% of the estimated cost as per Clause 2(ix)(b) of the NIeT:-

"a. PLWSS to Rewalsar Town (Urban) in District Mandi HP (SH: Supply and erection of pumping machinery and providing, laying, jointing and testing of rising main and C/O anchor block) for Rs.5,11,27,727/- completed 98% work.

b. Providing WSS/LWSS to left out POP in NCPC habitation GP Salaper, Dehar Brotei, Nalag, Chanol, Bobar, Salwan, etc. and Smaun (SH: C/O intake chamber providing, laying gravity main from RD 0 to 16500 mtrs. and C/O pillars of gravity main) for Rs.3,12,04,194/- completed on 15.04.2017 and by giving 7% per annum enhancement over the actual value of completed work

calculated from the date of completion to the date of bid opening which comes to Rs.65,52,881/-. Total Rs.3,77,57,075/- (3,12,04,194 + 65,52,881)."

3(ii). Learned counsel further submitted that for calculating the cost of already executed similar works, the formula provided in CPWD Manual (Annexure P-3) has been used by the petitioner for bringing the value of the work done in past to the current costing level by enhancing the actual value of work at simple rate of 7% per annum calculated from the date of completion to the date of bid opening. Learned counsel contended that this formula of enhancement by 7% is to be treated as an integral part of the conditions of the NIeT and cannot be segregated from Clause 2(ix) of the NIeT. Therefore, even if this formula of calculating the cost of old works to arrive at their current costing level is not expressly incorporated in the NIeT, still it is to be deemed to have been automatically incorporated in the tender in question as CPWD Manual has beenadopted by the respondents.

3(iii). It is further contended that in case the above referred formula is used, then the value of two similar completed works quoted by the petitioner in his bid will become Rs.3,77,57,075/-, i.e. more than Rs.3,61,51,994/- (50% of the estimated cost) required under Clause 2(ix)(b) of the NIeT, thereby making petitioner's technical bid conforming to the terms stipulated in the tender document.

4. Learned Advocate General, while opposing the prayers of the petitioner argued that**:-**

4(i). Initially a Draft Notice Inviting Tenders (DNIT) for the construction work in question was prepared and approved by respondent No.2 on 23.08.2019 on 75% of the estimated cost for Rs.5,42,17,360/-. The DNIT did not have any provision for enhancing the actual value of similar works executed in past to bring the same to the current level by calculating the same annually at simple rate of 7% per annum. The tenders for the work were floated accordingly on 28.08.2019. None of the participating bidders questioned about non-inclusion of 7% indexing clause at that time. The work, however, could not be awarded as the negotiations with the eligible bidder had failed.

4(ii). The State thereafter issued office memorandum dated 10.01.2020, laying down guidelines/terms & conditions to be followed for tenders valuing more than Rs.2 Crores. Accordingly, the DNIT for the work in

question was also revised and reframed in accordance with the memorandum dated 10.01.2020 on 100% of the estimated cost. This was approved by respondent No.2 on 06.05.2020 for Rs.7,23,03,987/-. Since the office memorandum dated 10.01.2020 did not contain 7% indexing clause, therefore, no such provision was adopted while reframing the DNIT. The tender in question was thereafter floated by respondent No.4 on 22.05.2020. The estimated cost of the work was Rs.7,23,03,987/-. One of the eligibility condition for the bidder was to have executed similar works during last seven years as defined in Clause 2(ix) with values indicated there. Petitioner applied under Clause 2(ix)(b) claiming to have executed two similar works costing not less than 50% of the estimated amount of the tendered work.

4(iii). 50% of the estimated cost of the work (Rs.7,23,03,987/-) comes to Rs.3,61,51,994/-, whereas the completed cost of the works relied upon by the petitioner is Rs.3,12,04,194/-. The cost of the similar works relied upon by the petitioner was below 50% benchmark, therefore, the technical bid of the petitioner was rejected by the Evaluation Committee as he did not fulfil the eligibility criteria as per the NIeT requirement.

4(iv). Respondent No.1 in its affidavit dated 21.09.2020 filed pursuant to an order passed by this Court on 26.08.2020 has admitted that the respondent-Jal Shakti Vibhag has switched over to CPWD Manual with upto date amendments w.e.f. 03.10.2018. However, the tender in question was issued subsequently on 22.05.2020 in accordance with the Government office memorandum dated 10.01.2020 as per the guidelines/terms & conditions laid down therein, to be followed for tenders costing more than Rs.2 Crores, which contained no provision for 7% indexing.

5. Observations:-

Admittedly, it is not the case of the petitioner that any condition of 7% indexing was actually incorporated in the NIeT in question. In fact, the petitioner wants to read this condition in the tender document by falling back upon CPWD Manual (Annexure P-3) and asserts that the respondents were bound to bodily lift all the conditions contained in the CPWD Manual including the condition of7% indexing and to incorporate them in the NIeT inquestion. The precise argument raised by learned counsel for the petitioner is that irrespective of incorporation of this condition in the NIeT, the calculation of the cost of previous

similar works done by the bidder has to be assessed at 7% enhancement per annum to ascertain their current value.

The fact remains that the NIeT does not contain any such condition of 7% indexing. All the bidders including the petitioner have participated under the specific terms & conditions of the tender document.

The tender document in question was issued for the second time for the same work. Even when it was issued for the first time, no such condition of 7% indexing was there. None of the bidders voiced any grievance about non-inclusion of 7% indexing clause in the NIeT. Similarly, second time also when the NIeT in question was issued, there was no such clause pertaining to 7% enhancement of the cost of the similar works executed in past. Petitioner as per his admission had never sought any clarification from the respondents with respect to non-inclusion of 7% enhancement clause in the NIeT. After participating under the specific terms & conditions of the tender document, it is not permissible for him to challenge the rejection of his technical bid on the ground that his eligibility was to be determined under a particular clause, which in reality is not part of the tender document. We are not examining the question as to whether 7% indexing clause of CPWD manual was required to be part of the tender document or not. The stage to raise that question has gone for the petitioner. Therefore, even assuming that the respondents were bound to invite tenders as per the CPWD Manual, the fact remains that the tender document was issued in consonance with memorandum dated 10.01.2020 issued by the State Government, which did not provide for calculating cost of similar works carried out in past at 7% indexing rate. The acceptance of contentions of the petitioner would also mean prejudicing various such contractors, who might be interested to bid for the work in question, but might not have submitted their bids because of the eligibility criteria expressly provided in Clause 2(ix) of the NIeT without knowing 7% indexing clause in the CPWD manual.

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."

This Court in ***CWP No.3583 of 2020***, titled ***M/s Chamunda Construction Company Versus State of Himachal Pradesh and others***, decided on 28.09.2020, has held as under vide paras 12 to 14:-

> *"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.*
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> ***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."

In ***Civil Appeal No.2197 of 2020,*** titled ***Bharat Coking Coal Ltd. & Ors. Versus AMR Dev Prabha & Ors.***, decided on 18th March, 2020, the Hon'ble Supreme Court, while considering the legal position settled in ***Raunaq International Ltd. v. IVR Construction Ltd, (1999) 1 SCC 492; Maa Binda Express Carrier v.NorthEast Frontier Railway, (2014) 3 SCC 760*** and ***Shobikaa Impex (P) Ltd. V. Central Medical Services Society, (2016) 16 SCC 233,*** observed as under:-

"39. Additionally, we are not impressed with the first respondent's argument that there is a certain public interest at stake whenever the public exchequer is involved. There are various factors in play, in addition to mere bidding price, like technical ability and timely completion which must be kept in mind. And adopting such interpretation would permanently blur the line between contractual disputes involving the State and those affecting public law. This has aptly been highlighted in Raunaq International Ltd. v. IVR Construction Ltd. [(1999) 1 SCC 492]

"11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered

by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers." (emphasis supplied)

40. Further, the first respondent has failed to demonstrate which public law right it was claiming. The main thrust of AMR Dev Prabha's case has been on the fact that at 1:03PM on 05.05.2015 it was declared the lowest bidder (or L1). However, being declared the L1 bidder does not bestow upon any entity a public law entitlement to award of the contract, as noted in Maa Binda Express Carrier v. North-East Frontier Railway [(2014) 3 SCC 760]:

"8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and nondiscriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and

cogent reasons provided such relaxation is permissible under the terms governing the tender process." (emphasis supplied)

47. *With regard to other allegations concerning condonation of Respondent No. 6's delay in producing guarantees, we would only reiterate that there is no prohibition in law against public authorities granting relaxations for bona fide reasons. In Shobikaa Impex (P) Ltd. v. Central Medical Services Society [(2016) 16 SCC 233], it has been noted that:*

"... the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It has been further held that 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 powers 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."

48. *Even if there had been a minor deviation from explicit terms of the NIT, it would not be sufficient by itself in the absence of mala fide for courts to set aside the tender at the behest of an unsuccessful bidder. This is because notice must be kept of the impact of overturning an executive decision and its impact* on the larger public interest in the form of cost overruns or delays."

When tender conditions are specific and unambiguous, it is not lawful to bring ambiguity into the same by reading certain clauses from a manual to determine the eligibility of the participating bidders when these clauses were not incorporated in the tender document. Non-incorporation of conditions of the manual in the NIeT were not questioned by the petitioner. Having participated under the express terms of the tender document and after failing therein, it is not permissible for the petitioner to contend that his eligibility was required to be determined as per conditions contained in the manual. We do not find any infirmity in the action of respondents No.1 to 4 in rejecting the Technical Bid of the petitioner.

In view of the above discussion, we find no merit in the instant writ petition and the same is accordingly dismissed alongwith pending miscellaneous application(s), if any.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Balwinder Singh .....Appellant.

Versus

State of H.P. ....Respondent.

Cr. Appeal No. 372 of 2019.
Reserved on: 12th October, 2020.
Date of Decision: 16th October, 2020.

Indian Penal Code, 1860- Sections 302 & 201- Appellant convicted and sentenced for the commission of offence under section 302 & 201- Penal Code by trial court for committing murder of his wife- Judgment of conviction and sentence challenged- Held, that cause of death of deceased due to poisoning established from FSL report- Occurrence of bluish/bruises marks on the neck of deceased proved which are not explained by the accused- Overdose of prescribed medicine, Oprex-5, not proved to be cause of death- Act of appellant in applying force on the neck of the deceased and administering lethal drugs to her proved from evidence resulting in her death- Impugned judgment of conviction and sentence maintained and affirmed- Appeal dismissed. (Paras 6, 7, 8 & 9).

For the Appellant: Mr. Adarsh K. Vashista, Advocate.
For the Respondent: Mr. Hemant Vaid, Additional Advocate General with Mr. J.S. Guleria, Dy. A.Gs.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The aggrieved convict/appellant herein, through, the extant appeal strives, to, cast an onslaught, vis-a-vis, the verdict of conviction, made upon him, on 24.06.2019, by the learned Additional Sessions Judge (II), Kangra at Dharamshala, H.P., upon, Sessions case number 6-D/VII/2018, qua charges framed under Section 302, and, under Section 201 of the IPC, and, also through his instituting the extant appeal, before this Court, he has strived to beget reversal, of, imposition, upon him, of, sentence, of, rigorous imprisonment for life, and, also payment of fine of Rs.10,000/-, and, in default whereof, he stood sentenced, to, under go rigorous imprisonment, for, a period of five months, for his committing an offence punishable, under, Section 302 of the IPC. He also becomes aggrieved, from the imposition, upon, him of a sentence, of, rigorous imprisonment, for, a period of five years, and, to pay a fine of Rs.10,000/-, and, in default whereof, he further became sentenced, to, undergo rigorous imprisonment for a period of five months, hence, for his committing an offence punishable under Section 201 of the IPC. All the afore sentences, as, imposed upon the accused/convict/appellant herein, were, ordered to run concurrently.

2. The genesis of the prosecution story, becomes embodied, in a previous statement, made, under Section 154 of the Cr.P.C., by one Rattan Chand, the father-in-law, of, the accused, before the Investigating Officer concerned, statement whereof, is, borne in Ex.PW1/A. In pursuance to the afore statement, a formal FIR, borne in Ex.PW 13/D, became registered with Police Station, Haripur, District Kangra, H.P. Therein, the complainant has made articulation(s) qua his retiring, from, the job, of, a Peon, in, the, Postal Department. Deceased Reena Devi, was, his eldest daughter. About 13 years ago, she was married to accused Balwinder Singh, in accordance with Hindu rites, and, ceremonies. On 26.10.2017, his wife along with his daughter, had gone to Hamirpur, for fetching medicines, for, his deceased daughter, namely, Reena Devi, as, she was suffering from certain tension. On their way, they visited accused Balwinder Singh. He also accompanied them from there to Hamirpur. They all returned home at around 4.30 p.m, and, they had their dinner together. Thereafter accused, and, his daughter Reena Devi, went to sleep, in, their room. During morning, at about 5 a.m., his daughter-in-law, Smt. Sarika Devi, came with the morning tea, and, knocked the door, of, the room, of, his daughter, but there was no response from inside. She gave the cup of tea to him and, went to the kitchen. She again prepared the tea at around 7.00 a.m., for hence awakening, the, accused, and, deceased Reena Devi, yet, she failed to do so despite hers calling them. Consequently, he went to the window, and, therefrom called his daughter, thereupon, the accused came out of the room, and, followed him to the kitchen. The accused had his morning tea, in, the kitchen, and, then called him to his room, and, thereat, the accused confided in him, that, he had given all the tablets carried in a strip, to, Reena Devi. Thereupon, PW-1 Rattan Chand, noticed that water, was, coming out from the nostrils, as well as, the mouth, of, his daughter Reena Devi. Her pulse was not there. He also noticed bluish marks, on her neck, besides he also noticed that his daughter, had vomited near the bed, and, stains thereof, were on the ground, and, on the pillow cover. The strips of medicines were lying on the shelf. One of such strips was totally empty, whereas, from two strips, one tablet, was taken out, from each, of, those strips. These strips were brought by them, from, Hamirpur on 26.10.2017. Accused used to proclaim that in case the condition of Reena Devi would not improve, he would kill her.

3. The afore genesis of the prosecution case, as, borne in Ex.PW1/A, exhibit whereof embodies the statement of the complainant PW-1, one Rattan Chand, (a) was also enjoined, to, upon, his stepping into the witness box, hence, become narrated rather with completest concurrence therewith, (b) and, also without any gross improvements, and, embellishments being made therefrom(s). A wholesome reading, of, the testification, rendered before the learned trial Court, by the afore complainant, one Rattan Chand, makes categorical

underlinings, vis-a-vis, his thereins making articulations, hence, bearing, the, completest compatibility, vis-a-vis, his previous statement recorded, in writing, and, as, becomes borne in Ex.PW1/A. Even during the course of his being put to the test, of, an acid cross-examination, he did not either contradict, all the afore echoings, as, made by him, in his examination-in-chief, nor he grossly embellished nor improved, upon, his previous statement recorded in writing, hence, embodied in Ex.PW1/A, wherefrom, his deposition, acquires tenacious evidentiary worth, (c) more so when it also acquires, the, completest corroboration, from, the deposition, of, his wife, one Lata Devi, who stepped into the witness box, as, PW-16.

4. The afore renditions, vis-a-vis, the prosecution version, as, borne in Ex.PW1/A, does enable this Court, to, draw an inference qua the accused, and, the deceased being the solitary occupants, of, the room occurring, in, the homestead, of, PW-1, (a) and, with firm echoing(s) occurring thereins, in display, vis-a-vis, the accused bolting from inside, the door of the room, hence, solitarily occupied by him along with his deceased wife, hence, obviously he precluded, the, ingress(es) thereinto, by any other member(s), of, the family of PW-1. Necessarily also, as, deposed with utmost consistency, and, mutual corroboration both, by PW-1, and, by PW-16, qua upon one Sarika Devi, the daughter-in-law, of PW-1, despite knocking twice, the, door of the room, occupied by the accused, and, the deceased, rather at 5.00 a.m., and, thereafter at 7.00 a.m, of the fateful day, inasmuch, as, on 26.10.2017, (a) yet no response emanating from the accused or from the deceased, (b) and, thereupons hers retrieving to the kitchen, whereupon, PW-1 became goaded, to go, to the window, to call the deceased, hence, leading the accused to egress, from, the apposite room. However, accused followed PW-1 to the kitchen, and, thereat he took his morning tea, and, apprised PW-1, vis-a-vis, his administering, the, entire strip of tablets, to, Reena Devi. Consequently, PW-1 was constrained to visit, the, room, hence, solitarily occupied by the deceased, and, the accused, door whereof, become during the night hence bolted from inside by the accused, and, whereat he noticed, vis-a-vis, the deceased's, vomit existing at the bed, and, on the floor. The effect of the afore made deposition(s) rather with inter se corroboration, both by PW-1, and, PW-6, does evince, the conduct of the accused, rather being inconsistent with his innocence, and, rather it being consistent with his guilt. The afore rendered testifications, hence, with utmost inter se corroboration, do necessarily acquire, conclusive evidentiary worth, as, in their respective cross-examination(s), no suggestion(s) in denial, of, the afore factums, became meted to them nor obviously any denial or affirmative response(s) thereto, became elicited from both the afores. Consequently, the effect thereof, is, vis-a-vis, the reticence(s) of the accused to make responses, to, the repeated visit(s) to his room, of, one Sarika Devi, engendering suspicion, and, also when only, upon, PW-1 calling, for his deceased daughter, from, the window of the room, and, rather

thereupon(s), the accused responding, and, his revealing, the, purported cause of demise of the deceased, being comprised in hers taking, the, entire strip of the prescribed medicines, hence bolsters an inference qua his afore conduct exemplifying, his, guilt.

5. Be that as it may, the empty strip, of, Oprex-5, comprised in Ex.P27, became recovered, through, recovery memo, borne in Ex.PW2/B, and, all became enclosed, in, cloth parcel Ex.P-28. The accused would succeed in scuttling the charges framed against him, only upon, the report, of, the FSL, making categorical echoings, vis-a-vis, the cause of demise, of, the deceased, being ascribable, to an over dose, of, the afore medicine, and, its consumption being volitional, and, obviously it not being forcibly administered,upon, the deceased, by, the accused. However, the report of the FSL, as, embodied in Ex.PA, carries underlinings, (i) vis-a-vis, the contents of the enclosed parcels, hence, exhibited as P/1, P/2, P/5-1, P/5-2 and P/5-4, (ii) upon, theirs being subject to analyses, theirs being found to contain phosphine gas, (iii) and, in Exhibits, P/3-1, and P/3-2, Chlorpromazine being detected, and, haloperidol being detected in contents of Ex. P/3-3, (iv) whereas, Chlorpromazie and Haloperidol, being not detected, in, the contents of parcels/exhibits P/1, P/2,P/4, P/5-1, P/5-2, P/5-3 and P/5-4.

6. Nowat, the afore conclusions, as, embodied in the report of the FSL, borne in Ex.PA, also became accepted, by the doctor, who conducted the postmortem examination, upon, the deceased, and, in consonance therewith he authored, his apposite opinion, as, becomes borne in Ex.PW7/D, (a) and, who also during, the course, of, his testification, made in Court, proved all the observations occurring therein, preeminently the one appertaining, to, his ascribing poisoning, to be the cause of demise, of, the deceased. However, the learned counsel appearing for the accused/convict, makes dependences, upon, the articulations, existing, in the cross-examination of PW-6, wherefrom whom, the deceased was receiving treatment, for, curing, the, ailment beset, upon, her, inasmuch, as, chronic schizophrenia, (b) and, wherein, he, overruled, the, factum of Oprex-5, being sedative, and, also dispelled, the factum, of, the consumption, of, the entire strip of the medicines, rather leading, to, the demise of the deceased. Consequently, he argues that, hence, their occur(s) inter se contradictions, inter se, the afore underlinings, as, made in the report of the FSL, vis-a-vis, the cause of the demise, of, the deceased, and, vis-a-vis, the afore echoings, hence, occurring in the cross-examination of PW-6, (c) and, also therefrom he strives to erect an argument, vis-a-vis, the failings, of, the prosecution, to collect, the strips of the fatal medicine, as, become enunciated in the report of the FSL, to beget the demise of one Reena Devi, rather causing the sequel, of, the accused becoming entitled to benefit of doubt. However, this court remains unimpressed, with the afore made submission, inasmuch, as, both in the inquest report, as, became initially drawn by the

Investigating Officer, and, in the deposition of PW-7, there occur clear communications, vis-a-vis, some bruises occurring below the neck of the deceased. The occurrence of bruises/bluish marks, on the neck of the deceased, also stands consistently deposed with utmost tandem, and, unison, both by PW-1, and, PW-16. Conspicuously, also with the accused failing to give an explication, vis-a-vis, the deceased making vomits. Moreover, reiteratedly when no evidence surges forth, hence exemplificatory, vis-a-vis, his meteings, any, valid explication, qua the deceased making vomit, despite hers purportedly consuming, an, overdose, of, the prescribed medication, especially when intake whereof, is, evidently, not, the reason for her demise. Consequently, all the afore, failings, of the accused, dispels, the, factum, of the deceased consuming an overdose, of the prescribed medicines. However, PW-7 since spells in his deposition, borne in his examination-in-chief, vis-a-vis, the hyoid bone being intact, and, hence strangulation cannot become concluded, to be the cause, of, demise of the deceased.

7. Be that as it may, the failure of collections or even failure of recoveries, at the instance of the accused, hence by the Investigating Officer concerned, vis-a-vis, the afore fatal medicines, hence, causing formation, of, phosphine gas, within the body of the deceased, in sequel whereto, she, as, depicted in Ex. PA, suffered her demise, (i) does not in the least, hence coax this Court, to dispel the findings, of, conviction drawn against the accused, by the learned trial Court, for, charges framed under Section 302, and, 201 of the IPC, (ii) and, the reasons for making the afore conclusion become generated from the afore inference manifesting hence the conduct of the accused, conduct whereof, is, palpably personificatory, of, his guilt than his innocence; (iii) it emerging, that, in the garb of a false explanation, vis-a-vis, the cause, of, demise of the deceased, the accused misleading, and, mis-maneuvering, the, investigations, vis-a-vis, the genuine cause, of, demise of the deceased, rather only for, precluding hence uncoverings being made by the Investigating Officer, vis-a-vis, the genuine cause, of, the demise, of, the deceased. Obviously the benefit of the afore mis-maneuvering(s), and, mis-communications, as, become deployed by the accused, for, his therethrough, hence misleading the investigations, cannot also become bestowed upon him. (iv) Moreover, the accused completely failed to explain, the cause of occurrence, of, bluish marks, on, the neck of the deceased, and, when the afore lack, is construed, with, the afore inference, as, drawn against him, vis-a-vis, his conduct, being personificatory of his guilt rather than his innocence, (v) thereupon, the conclusion hence emanating therefrom, is rather, qua the accused stealthily in the guise, of, over dose, of, prescribed medications, becoming purportedly consumed by the deceased, for, hers' hence begetting alleviations, from her mental ailment, his obviously contriving a false reason qua over dose thereof, leading to her demise, (vi) and, also thereupon through the afore echoings occurring in the cross-examination of PW-6, wherein the latter

makes underlinings, vis-a-vis, the recovered tablet of Oprex-5, not being lethal medicine, he falsely attempts to cover up, the, genuine factum, of his rather applying force, on the neck, of, the deceased, for, his becoming facilitated, to, forcibly administer, lethal drugs, upon, the deceased, (vii) factum whereof, become(s) pronounced in the report of FSL, to ultimately beget the demise of the deceased. Preeminently also hence with the prosecution proving the apposite motive, inasmuch, as, the accused proclaiming, given her chronic ailment, hence, to strive to get rid off the deceased, thereupon, the proof, of, the afore motive also begets an firm inference qua all the afore links in the chain, of, circumstances, fully proving the charges against the accused.

8. In summa, the conclusions, embodied in the report of the FSL, and, appertaining to the cause, of, demise of the deceased, are well founded, and, therethroughs, the charge against the accused becomes sustained. The potent motivating reason for this Court, for accepting the afore conclusion also become engendered, from, the factum, of, the relevant exhibits, as, became transmitted to the FSL concerned, hence in a sealed parcel, and, also upon theirs becoming produced, in court, for theirs being shown in Court, to, the prosecution witnesses, rather theirs thereat, not making disclosures, vis-a-vis, the enclosed therewithin contents, in the bottles, and, vials, becoming stealthily introduced or being tampered, especially when the seals embossed thereons, were all intact, importantly, at the afore stage.

9. For the fore going reasons, there is no merit in the extant appeal, and, it is dismissed accordingly. Consequently, the impugned judgment, convicting, and, sentencing the accused/convict, for, his committing offences punishable under Section 302, and, under Section 201 of the IPC, is maintained, and, affirmed. All pending applications also stand disposed of. Records be sent back forthwith.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Dishant Kumar ...Petitioner.

Versus

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

CWPOA No. 3162 of 2020.
Reserved on : 9th October, 2020.
Decided on : 16th October, 2020

Constitution of India, 1950-Article 226- Petitioner claiming benefit of conferment of status of regularization against the post of Daftri/peon/Chowkidar, class-IV- employee on completion of 5 years of continuous service- Held, that espousal of the petitioner is merit worthy and within

the ambit of the apposite policy- Petition allowed – Respondents directed to regularize the service of petitioner against the substantive post alongwith all incidental benefits. (Paras 4 & 5).

For the Petitioner(s): Mr. Daleep Chandel, Advocate, vice Mr. V.D. Khidtta, Advocate.

For the Respondents: Mr. Hemant Vaid, and, Mr. Ashwani Sharma, Additional Advocate Generals.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge .

Through, the, extant writ petition, the writ petitioner, claims, benefit of conferment, of, status, of, regularization, against the post, Daftri/Peon/Chowkidar, Class-IV employee, upon, him, imperatively, upon his completing, hence, within the ambit, of, the relevant policy, rather 5 years of continuous service thereagainst.

2. Since, the afore endeavour of the petitioner, becomes, averred in the petition, to, beget failure, despite his repeated requests being made upon the respondents, hence, through the extant petition, he seeks issuance, of, an apposite writ, of, mandamus, upon, the respondents.

3. However, the respondents seriously contest(s), the afore strivings, of, a mandamus, being made upon them, and, the afore contest is hinged, upon, the factum of the petitioner, being not, on the muster rolls, of, the government, nor his drawing money from the government treasury, rather his drawing moneys/remunerations, from, the amalgamated funds, hence collected from the students.

4. The petitioner, through, filing rejoinder thereto, denied the afore factum, hence, has been, therethrough(s), able to de-establish the afore contention reared by the respondents, in their reply, (i) inasmuch, as, his casting a contention therein, that, even the amalgamated funds become deposited, in, the government treasury, (ii) and, thereafter payments rather being made to the petitioner by the Principal. Since, the afore contention reared by the petitioner, in his rejoinder, meted to the reply of the respondents, has not come under any serious contest, being made thereto, by the respondents, through, theirs seeking time, to, file either a supplementary explicatory affidavit, or, strivings being made to cast further pleadings, (iii) thereupon, with emanations, of, remunerations, as made, to the petitioner, rather occurring from the government treasury, (iv) whereupon(s) dehors theirs being a part of amalgamated funds, even if collected from students, alike tuition fee(s), obviously as resource generating mechanism, for, meteings expenditure entailed, upon, institutions running the college, yet hence, all the remuneration(s), as, generate from the government treasury, and, as become disbursed by the Principal, to, the writ petitioner, obviously don the trait, and, characteristics,

of, remittance of government money(ies), or releases, thereof towards, remunerations or wages, to, the writ petitioner.

5. In aftermath, the espousal of the petitioner, is, meritworthy, and, if within the ambit of the apposite policy, the petitioner has completed the requisite period of service, under the respondents, thereupon, the respondents are directed, to, forthwith make an order of regularization in service, of, the petitioner, against the apposite substantive post, along with all incidental thereto benefits. The writ petition is allowed, and, all the pending applications also stand disposed of.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Smt. Satya Devi ...Petitioner.

Versus

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

CWPOA No. 267 of 2020.
Reserved on : 8th October, 2020.
Decided on : 16th October, 2020.

Constitution of India, 1950- Article 226- Work charge status conferred on Tejat Ram deceased husband of petitioner, on 1.1.2002- Petitioner has sought writ of mandamus directly, the respondents to grant family pension alongwith all incidental benefits- Held, that it is not established that deceased husband of petitioner completed a period of continuous service on the date of superannuation as a regular employee- The deceased husband of petitioner only entitled to pension and hence petitioner also entitled to only family pension- Petition allowed- Respondents directed to disburse family pension to the petitioner along with other incidental benefits. (Paras 2 & 3)

For the Petitioner: Mr. Ashwani Gupta, Advocate.
For Respondents No.1 to 4: Mr. Hemant Vaid, and, Mr. Hemanshu Mishra, Additional Advocate Generals with Mr. Vikrant Chandel, Dy. A.G.
For Respondent No.5: Mr. Lokender Pal Thakur, Senior Panel Counsel.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge .

The writ petitioner, is, a widow of deceased Jagat Ram, whereupon whom, work charge status was conferred, on 1.1.2002. However, the demise of late Jagat Ram happened, on 17th March, 2007. Upon, his demise the petitioner, claims the benefit of family pension, yet the afore espousal, of, the petitioner, became denied to her. Consequently, the writ petitioner,

through, the extant writ petition, asks, for, a mandamus being made, upon, the respondents, for, hers therefrom, becoming, granted family pension along with all incidental thereto benefits.

2. Though, the respondents contested, the availability, of, the afore benefit to the petitioner, and, the afore contest becomes rested, upon, the factum, vis-a-vis, the deceased Jagat Ram, upon, his completing 12 years of service, hence, his superannuating on 30.06.2016, (i) and, thereupon, the bestowings, of, the benefit(s), of Rule 54 of the CCS Pension Rules, either upon him or upon, his surviving spouse, rather becoming unvindicable. The afore contest can be rested, only, upon a perusal of Rule 54, of, the CCS Pension Rules, the relevant sub-rule (2) (i) whereof, becomes extracted hereinafter:-

> **" 54. Family Pension.**
>
> (1) The provision of this rule shall apply-
>
> (a).....
>
> (b).....
>
> (2) Subject to the provisions of sub-rule 13-B and without prejudice to the provisions contained in sub-rule (3), where a Government servant dies-
>
> (i) after completion of one year of continuous service; or
>
> ....."

Though, on making a reading of sub rule (2) (i) of Rule 54, of, the CCS Pension Rules, it became imperative for the petitioner, to, establish, vis-a-vis, her deceased husband, expiring, after the latter completing one year, of, continuous service, (a) yet the petitioner can not be held to establish the afore drawn legal frontier, (b) inasmuch, as, the deceased became conferred, the, status, of, a regular employee, in contemporaneity, vis-a-vis, his completing the age of 58 years, (c) and, whereas, he was to under the relevant rules, hence retire thereat from service, reiteratedly hence, the requisite ordained therein tenet, qua his thereat completing, a, period of one year of continuous service, remained unsatiated. In other words, upon, superannuation, of, the deceased from government service, and, without his thereat completing the requisite period of one year, of, continuous service, under the respondents, hence, the petitioner becomes disentitled to the benefit of sub-rule (2)(i) of Rule 54 of the CCS Pension Rules. However, dehors, the afore the petitioner is yet entitled, to, the benefit of sub-rule (2) (iii), of, Rule 54 of the CCS Pension Rules, mandate whereof, stands extracted hereinafter:-

> **" 54. Family Pension.**
>
> (1) The provision of this rule shall apply-
>
> (a).....
>
> (b).....

(2) Subject to the provisions of sub-rule 13-B and without prejudice to the provisions contained in sub-rule (3), where a Government servant dies-

(i) .....

(ii).....

(iii) after retirement from service and was on the date of death in receipt of pension, or compassionate allowances referred in these rules,"

inasmuch, as, even if assuming, the deceased became superannuated from service on 30.06.2006, as, borne out, from Annexure R-I to R-3, and, as appended with reply furnished, by the respondents concerned, to the writ petition, (a) given in contemporaneity thereof, the deceased not expiring, and, rather his demise occurring in the year 2007, and, obviously, when, upon, the happening, of, superannuation, of, the deceased husband, of, the petitioner, since 2001, and, upto his demise, hence, occurring in the year 2006, he obviously became, a, recipient of pension, (b) thereupon, within the ambit of sub-rule (2) (iii) of Rule 54 of the CCS Pension Rules, necessarily with her deceased husband, upon, his retirement , being, a, recipient of pension, she becomes entitled, to, family pension, and, in the amounts carried therein.

3. For the foregoing reasons, the extant petition, is, allowed, and, the respondents are directed, to, disburse family pension to the petitioner, in, terms of sub-rule (2) (iii) of Rule 54 of the CCS Pension Rules along with all other incidental thereto benefits. All pending applications also stand disposed of.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Shanta Kumar ...Petitioner.

Versus

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

CWPOA No. 56 of 2019.
Reserved on : 9th October, 2020.
Decided on : 16th October, 2020.

Constitution of India, 1950- Article 226- Petitioner appeared as OBC (reserved) candidate in the relevant recruitment process- Allegation that petitioner not treated to fall within OBC category but within general category- Petitioner has challenged the awarding of marks to him within general category and selection of co-respondent No.3 not occurring in the originally drawn merit- Held, that certain candidates belonging to scheduled Tribe and OBC category(ies)

who appeared in screening test were shown in general category- However, rectification made subsequently and marks awarded to the candidates in consonance with their applied for categories vis-a-vis advertised post(s) pursuant to direction in CWPOA No. 1110 of 2017- Score sheet called from H.P Public Service Commission shows co-respondent No.3, a candidate from OBC category to be successful candidate as against petitioner – Petition dismissed. (Paras 3, 4 & 5).

For the Petitioner(s):	Mr. Tajinder Singh, Advocate.
For Respondent No.1:	Mr. Hemant Vaid, and, Mr. Hemanshu Mishra, Additional Advocate Generals with Mr. J.S. Guleria, and, Mr. Narender Thakur, Dy. A. Gs.
For Respondent No.2:	Mr. Vikrant Thakur, Advocate.
For Respondent No.3:	Mr. Shrawan Dogra, Senior Advocate with Mr. Manish Sharma, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge .

The petitioner appearing, as, OBC (reserved) candidate, in, the relevant recruitment process. However, the petitioner avers, that, he was not treated to fall, within, the afore category, rather he was treated to fall within the general category, (a) hence, the awarding of marks to him, also did not happen or occur, on anvil, of his belonging, to, the OBC category, rather it occurred, on anvil, of, his being, a, general category candidate, (b) thereupon, the entire results drawn, vis-a-vis, the writ petitioner, or even the awarding(s) of marks, becoming amenable for interference by this Court. Furthermore, the petitioner also challenges, the, inclusion of co-respondent No.3, in the select/merit list, and, the afore challenge is anvilled, upon, the factum, of, the name of the afore co-respondent No.3, not occurring in the originally drawn merit, and, it thereafter being stealthily included therein.

2. All the afore contentions, as, raised by the petitioner, in the writ petition, become dispelled, through, a detailed reply on affidavit, being meted thereto, by respondent No.2. Furthermore, it is with utmost candour spelt therein, vis-a-vis, even, in the OBC category, the petitioner became awarded marks lesser, than the co-respondent No.3, hence, the petitioner, is, de-facilitated, to cast any challenge, vis-a-vis, the selection, of, co-respondent No.3, against the advertised post. It is also apparent, on, a reading of the reply on affidavit, as, meted to the writ petition, by co-respondent No.2, vis-a-vis, co-respondent No.3 also applying, as, OBC candidate, vis-a-vis, the advertised post.

3. Be that as it may, any purported illegality, as, may surge forth, from, the initial loading, of, the results, rather by respondent No.2, at its official website, and, whereins, certain candidates belonging to Schedule Tribe, and, OBC, category(ies), and, who despite appearing, in the screening tests, were inadvertently shown, to be considered, in the general category, (a) in

category whereof, they obviously, did not fall, besides obvious fallacies in awardings, of, marks qua them occurred with the concomitant effect, of, theirs becoming denied, to become valid receipts of apposite reserved posts qua them. (b) Moreover, the apposite rectifications thereof, as, occurred subsequently, also, become contended by the counsel for the petitioner, to be exemplificatory, of, illegality(ies), and, also any subsequent addition(s), of, those candidates/aspirants, hence belonging, to, the Schedule Tribe, and, OBC category(ies), rather in the select list, being uncalled for. (b) Nonetheless, the afore argument become(s) unhinged, from, the factum, vis-a-vis, the afore subsequent addition, in the select list, of, candidates, hence belonging to Schedule Tribe, and, OBC categories, and, who appeared in the screening test, being those aspirants, rather whose results became hence declared, in, pursuance, to, unchallenged orders made, upon, CWPOA NO. 1110 of 2017, on, 29.03.2017, by the erstwhile Tribunal, (c) obviously, the consonance therewith hence the afore subsequent loading(s), of, their results, after apposite rectification(s), being made, vis-a-vis, awardings, of marks qua them hence in consonance, with there applied for categories, vis-a-vis, advertised post(s), does not, gather any vice of any illegality(ies), (d) rather reiteratedly the drawing(s), of, the select list, is, in pursuance of the afore unchallenged directions, and, orders, hence, both rectification, and, the drawing(s) of select list(s), are, amenable for becoming revered by this Court.

4. Be that as it may, the conspicuous factum, of, success or otherwise, of the petitioner or of co-respondent No.3, in, the relevant process, is, enjoined to be marshalled, from, the score sheet hence drawn by the H.P. Public Service Commission, (a) and, for this Court becoming facilitated, to make, the afore gauging(s), a direction, was made, upon, the learned counsel appearing, for, H.P. Public Service Commission, to, produce the the record, of, the selection process, before this Court, and, the afore command, is revered by the learned counsel appearing for co-respondent No.2, (b) and, upon retrieving the afore score sheets/records, of, the selection process, from, sealed covers, it is unraveled, vis-a-vis, co-respondent No.3, a candidate from the OBC category, being obviously a successful candidate, whereas, the name, of, the petitioner, rather not occurring therein.

5. For the fore going reasons, there is no merit in the extant petition, and, it is dismissed accordingly. The records/results,as, produced before this Court, after their re-sealing, be returned to respondent No.2, through, registered post. All pending applications also stand disposed of.

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

M/s Amit Singla through its Sole Proprietor
Mr. Amit Singla ....Petitioner.

Vs.

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

CWP No. 3368 of 2019
Reserved on: 02.12.2020
Date of Decision: 14.12.2020

Writ Jurisdiction:- The words used in the tender document cannot be ignored or treated as redundant or superfluous - that must be given meaning and their necessary significance - tender 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 condonation would amount to perversity in the understanding or application of the terms of tender ,,, which must be interfered with by a constitutional court. (Para 17).

Cases referred:

Bharat Coking Coal Ltd. and others Vs. AMR Dev Prabha and others 2020 SCC Online SC 335;
Vidarbha Irrigation Development Corporation Vs. Anoj Kumar Garwala2019 SCC Online SC 89;
Bakshi Security and Personnel Services Pvt. Ltd. v. Devkishan Computed Pvt. Ltd. and Ors., (2016) 8 SCC 446;
Poddar Steel Corpn. v. Ganesh Engg. Works (1991) 3 SCC 273;
Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818;

For the petitioner: Mr. Shrawan Dogra, Senior Advocate, with M/s Pranay Pratap Singh, Gaurav Chopra and Tejasvi Dogra, Advocates.

For the respondents: Mr. Ashok Sharma, Advocate General, with M/s Sumesh Raj, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals and Ms. Divya Sood, Deputy Advocate General, for respondents No. 1 to 8. Advocate.

Mr. J.S. Bhogal, Senior Advocate, with Mr. Suneet Goel, Advocate, for respondent No. 9.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *:*

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

> *"(i) Issue a writ, order or direction especially a writ in the nature of certiorari for quashing the Order/Proceedings of the Evaluation Committee dated 04.11.2019 (Annexure P-16) passed by respondent Nos. 3 to 8, whereby the Technical Bid submitted by the petitioner in response to the Notice Inviting Tender bearing Tender ID*

2019_PWD_31309_1, Tender Reference No. PW.SRJ/TA/Pub/2019-5939-42 dated 19.08.2019 for the work of "Improvement & Strengthening of Thalout- Thachi km 0/0 to 34/0 (Section Thalout Panjain to Thachi km 0/0 to 25/0) (Job No.CRF-HP-2018-19-161) (SH:- ROFD/FC, M/T, CD Works, R/Wall, B/Wall, PCC V-Shape Drain, Parapets, Crash Barrier, Road Furniture, Rain shelter & sign Board)" (Annexure P/1) has been rejected as being illegal, arbitrary and contrary to the terms and conditions incorporated in the aforesaid Notice Inviting Tender as also the Standard Bidding Document Procurement of Civil Works (SBD) appended therewith.

(ii) Issue a writ, order or direction especially a writ in the nature of Mandamus for directing the Respondent No. 1 to withdraw the decision of its duly constituted Committee, which had technically evaluated the bids submitted by the respective bidders, including the petitioner in response to the Notice Inviting Tender bearing Tender ID 2019_PWD_31309_1, Tender Reference No. PW.SRJ/TA/Pub/2019-5939-42 dated 19.08.2019 for the work of "Improvement & Strengthening of Thalout- Thachi km 0/0 to 34/0 (Section Thalout Panjain to Thachi km 0/0 to 25/0) (Job No.CRF-HP-2018-19-161) (SH:- ROFD/FC, M/T, CD Works, R/Wall, B/Wall, PCC V-Shape Drain, Parapets, Crash Barrier, Road Furniture, Rain shelter & sign Board)" and open the Financial bid submitted by the petitioner and undertake the tender process strictly in accordance with the terms and conditions prescribed in the Notice Inviting Tender as well as the Standard Bidding Document Procurement of Civil Works (SBD) appended thereto.

(iii) A writ in the nature of mandamus for restraining the Respondent No. 1 from finalizing the tender process and awarding the work of "Improvement & Strengthening of Thalout- Thachi km 0/0 to 34/0 (Section Thalout Panjain to Thachi km 0/0 to 25/0) (Job No.CRF-HP-2018-19-161) (SH:- ROFD/FC, M/T, CD Works, R/Wall, B/Wall, PCC V-Shape Drain, Parapets, Crash Barrier, Road Furniture, Rain shelter & sign Board)" to any other bidder who had participated in the E-Tender Process during pendency of the instant petition in this Hon'ble Court."

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

Respondent No. 1 issued a Notice Inviting Bids (Annexure P-1) in the month of August, 2019 for *"Improvement and Strengthening of Thalout- Thachi-Somagd Road Km 0/0 to 34/0 (Section Thalout Panjain to Thachi Km 0/0 to 25/0) (Job No.CRF-HP-2018-19-161) (SH:- ROFD/FC, M/T, CD Works, R/Wall, B/Wall, PCC V-Shape Drain, Parapets, Crash Barrier, Road Furniture, Rain shelter & Sign Board)".* The mode of submission of tender was

online. As per the Notice Inviting Bids, the period and time for downloading of Bidding Documents from E-procurement portal was from 05.09.2019 at 9:00 a.m. to 20.09.2019 up to 5:00 p.m. The date and time of pre-bid conference was 11.09.2019 at 11:30 a.m. and the date and time of *online* submission of bid was from 05.09.2019 at 9:00 a.m. to 20.09.2019 up to 5:00 p.m. The date and time of opening of *online* technical bids was 21.09.2019 at 11:00 a.m. The date and time of opening of *online* financial bids was to be announced and the place of opening of *online* bids was the office of Chief Engineer, Mandi Zone, H.P. P.W.D., Mandi. The approximate value of work was Rs.20,99,53,724/-. The name of the Division where the work was to be executed was Seraj Division at Janjehali. The Bid Security amount mentioned in the Notice Inviting Tenders was Rs.41,99,000/- and the period of completion of work was two years.

Paragraph Nos. 9 and 10 of the said Notice Inviting Bids provided as under:

> *"9. Bid documents consisting of qualification information and eligibility criterion for bidders, plans specifications, drawings, the schedule of quantities of the various classes of work to be done and the set of terms and conditions of contract to be complied with by the contractors can be seen on website https://hptendersgov.in and scanned copies of the required documents and information as per Section 2 (Formats and annexure) should be attached in the Technical Bid as prescribed in SBD.*
>
> *10. Uploaded documents of valid successful bidders will be verified with the original before signing the agreement. The valid successful bidder has to provide the original to the concerned authority on receipt of such letter, which will be sent through registered post/e-mail."*

Paragraph No.-12 thereof provided as under:

> *"12. Conditional bids and the bids not meeting the qualification criteria on the date of receipt of bids shall be summarily rejected."*

3. Section-1 of the Notice Inviting Bids dealt with Instructions to the Bidders. It comprised of Six Table of Clauses. Clause-A thereof contained general conditions. Paragraph No. 4 of Clause-A dealt with Qualification of the Bidder. Paragraph No. 4.3 thereof provided as under:

> *"4.3. If the Employer has not undertaken pre-qualification of potential bidders, all bidders shall include the following information and documents with their bids in Section 2:*
>
> *(a) copies of original documents defining the constitution or legal status, place of registration, and principal place of business;*

written power of attorney of the signatory of the Bid to commit the Bidder;

(b) total monetary value of construction work performed for each of the last five years;

(c) experience in works of a similar nature and size for each of the last five years, and details of works underway or contractually committed; and clients who may be contacted for further information on those contracts;

(d) major items of construction equipment proposed to carry out the Contract;

(e) qualifications and experience of key site management and technical personnel proposed for Contract;

(f) reports on the financial standing of the Bidder, such as profit and loss statements and auditor's reports for the past five years;

(g) evidence of access to line(s) of credit and availability of other financial resources facilities (10% of contract value), certified by the Bankers (Not more than 3 months old);

(h) undertaking that the bidder will be able to invest a minimum cash up to 25% of contract value of work, during implementation of work;

(i) authority to seek references from the Bidder's bankers;

(j) information regarding any litigation, current or during the last five years, in which the Bidder is involved, the parties concerned, and disputed Amount;

(k) proposals for subcontracting components of the Works amounting to more than 10 percent of the Bid Price (for each, the qualifications and experience of the identified sub-contractor in the relevant field should be annexed); and

(l) the proposed methodology and programme of construction, backed with equipment planning and deployment, duly supported with broad calculations and quality control procedures proposed to be adopted, justifying their capability of execution and completion of the work as per technical specifications within the stipulated period of completion as per milestones (for all contracts over Rs.5 Crore)."

Paragraph No. 4.5. of the same dealt with qualification criteria and Paragraph No. 4.5.1 thereof provided as under:

"4.5.1. Qualification will be based on Applicant's meeting on the following minimum pass/fail criteria regarding the Applicant's general and particular experience, personnel and equipment capabilities, and financial position, as demonstrated by the Applicant's responses in the forms attached to the Letter of Application (specified requirements for

joint ventures are given under para 4.8 below). Subcontractors' experience and resources shall not be taken into account in determining the Applicant's compliance with the qualifying criteria. To qualify for more than one contract, the applicant must demonstrate having experience and resources sufficient to meet the aggregate of the qualification criteria for each contract given in paragraphs 4.5.4, 4.5.5, 4.5.6 and 4.6 below:"

Paragraph No. 4.5.5 dealt with Equipment Capabilities, which provided as under:

"The applicant should own or should have assured ownership to the following key items of equipment, in full working order, and must demonstrate that, based on known commitments; they will be available for use in the proposed contract.

S. No.	Equipment type and characteristics	Minimum number required
(1)		
(2)		
(3)		
(Suggested lists is given in Annexure-II)		

Paragraph 4.7 provided for disqualification, which reads as under:

"4.7 Disqualification

Even though the Applicants meet the above criteria, they are subject to be disqualified if they have:

Made misleading or false representation in the form, statements submitted; and/or

Records of poor performance such as abandoning the work, rescinding of contract for which the reasons are attributable to the non-performance of the contractor; consistent history of litigation awarded against the Applicant or financial failure due to bankruptcy. The rescinding of contract of a joint venture on account of reasons other than non-performance, such as Most Experienced partner of joint venture pulling out, Court directions leading to breaking up of a joint venture before the start of work, which are not attributable to the poor performance of the contractor will, however, not affect the qualification of the individual partners."

4. Clause-B of Section-1 dealt with Bidding Documents. Paragraph 8.3 thereof provided as under:

"8.3 The bidder is expected to examine carefully all instructions, conditions of contract, contract data, forms, terms, and

technical specifications, bill of quantities, forms, Annexes and drawings in the Bid Document. Failure to comply with the requirements of Bid Documents shall be at the bidder's own risk. Pursuant to Clause 26 hereof, bids which are not substantially responsive to the requirements of the Bid Documents shall be rejected."

5. Clause-C pertained to Preparation of Bids and Paragraph-12 thereof provided as under:

"12. Documents Comprising the Bid
12.1 The bid to be submitted on-line by the bidder as Volume V of the bid document (refer Clause 8.1) shall comprise of scanned copies of the following in two separate parts/covers:
<u>Part I</u> shall be named "Technical Bid" and shall comprise
(i) Bid Security in the form specified in Section 8
(ii) Qualification Information and supporting documents as specified in Section 2
(iii) Certificates, undertakings, affidavits as specified in Section 2
(iv) Any other information pursuant to Clause 4.2 of these instructions
(v) Undertaking that the bid shall remain valid for the period specified in Clause 15.1
(vi) Acceptance/non-acceptance of Dispute Review Expert proposed in Clause 36.1
<u>Part II</u> shall be named "Financial Bid" and shall comprise
(i) Form of Bid as specified in Section 6
(ii) Priced Bill of Quantities for items specified in Section 7
12.3. Following documents, which are not submitted with the bid, will be deemed to be part of the bid.

Section	Particulars	Volume No.
1	Invitation for Bids (1KB)	
3	Instructions to Bidders	Volume-1
4	Contract Data	
5	Specifications	Volume-II
8	Drawings	Volume-IV

6. Clause-E pertained to Bid Opening and Evaluation and Paragraph 23.4 thereof provided as under:

"23.4 (i) Subject to confirmation of the bid security by the issuing Bank, the bids accompanied with valid bid security will be taken up for evaluation with respect to the Qualification Information and other information furnished in Part-1 of the bid pursuant to Clause 12.1.

(ii) After receipt of confirmation of the bid security, the bidder will be asked in writing (usually within 10 days of opening of the Technical Bid) to clarify or modify his technical bid, if necessary, with respect to any rectifiable defects.

(iii) The bidders will respond in not more than 7 days of issue of the clarification letter, which will also indicate the date, time and venue of opening of the Financial Bid (usually on the 21st day of opening of the Technical Bid).

(iv) Immediately (usually within 3 or 4 days), on receipt of these clarifications the Evaluation Committee will finalize the list of responsive bidders whose financial bids are eligible for consideration."

Paragraph No. 26.1 of Clause-E provided as under:

"26.1. During the detailed evaluation of "Technical Bids", the Employer will determine whether each Bid (a) meets the eligibility criteria defined in Clause 3 and 4; (b) has been properly signed; (c) is accompanied by the required securities and; (d) is substantially responsive to the requirements of the Bidding documents. During the detailed evaluation of the "Financial Bid", the responsiveness of the bids will be further determined with respect to the remaining bid conditions, i.e., priced bill of quantities, technical specifications, and drawings."

7. Annexure-II appended with the Notice Inviting Tenders provided for List of Plant & Equipment to be deployed on Contract Work and the same reads as under:

"Annexure-II

List of Plant & Equipment to be deployed on Contract Work

(Reference Cl. 4.5.5)

Sr. No.	Type of Equipment	Maximum age as on	Up to Rs. 50 Million	Rs.51-200 Million	Rs.201-500 Million	Rs.501-1000 Million & above
1.	Recycler/Stabliser	2	-	-	1	-
2.	Tipper Truck	5-7	-	-	15	-
3	Motor Grader	5	-	-	3	-
4.	Front end Loader	5	-	-	2	-
5.	Smooth Wheeled Roller	5	-	-	3	-

6.	Vibratory Roller	5	-	-	2	-
7.	Batch Mix Plant	5	-	-	1	-
8.	Paver finisher with Electronic Sensor	5	-	-	1	-
9.	Water Tanker	5	-	-	4	-
10	Bitumen Sprayer		-	-	1	-
11	Tandem Roller	5	-	-	2	-
12	Concrete Mixers with Integral weigh Batching facility	5	-	-	2	-
13	Track Mounted Mobile stone crusher	5	-	-	1	-

8. Special conditions appended with the Notice Inviting Tenders, *inter alia*, provided as under:

"1. Machinery at S. No. 1 i.e. Recycler/Stablizer in the list of plants & equipments as per Annexure-II with reference to Clause 4.5.5 of SBD should be in the ownership of bidder, as this is special type of machinery required for treatment of sub bases/base course for major item of construction in this project.

2. The evaluation Committee will verify the ownership proof of all the plants & equipments as per Annexure-II with reference to Clause 4.5.5 of SBD during technical evaluation. In case of any doubt Committee authorized by the Employer will physically check all the machinery required for the execution of work of technically qualified bidders. The financial bid will be opened only after the satisfaction of Committee.

3. The bidder has to furnish an affidavit that he will not raise any dispute/claim if the formation width of existing roadway/carriageway is less than that for single lane road. Any such issue will be reported to the Engineer-in-Charge for resolving promptly by the department."

9. Section-2 of the Notice Inviting Tenders dealt with Qualification Information and Paragraph 1.5 of the same provided as under:

"1. 5 Availability of key items of Contractor's Equipment essential for carrying out the Works (Ref. Clause 4.5.5).

The Bidder should list all the information requested below. Refer also to Sub Clause 4.3 (d) of the instructions to Bidders.

Item of	Requirement	Availability Proposals	Remarks

Equipment						(from whom to be purchased)
	No.	Capacity	Owned/Leased to be procured	Nos./Capacity	Age/ Condition	

Other relevant provisions of the Notice Inviting Bids shall be referred to at the relevant time.

10. Vide Corrigendum-II (Annexure P-2), the bid submission end date of the tender was extended by the Employer up to 21.09.2019 at 5:00 p.m. instead of 20.09.2019 at 5:00 p.m. It was also mentioned that the technical bid will be opened on 23.09.2019 at 11:00 a.m. instead of 21.09.2019 in the office of Chief Engineer, Mandi Zone, HP PWD, Mandi.

11. As per the records, two bidders responded to the Notice Inviting Bids, i.e., the petitioner and the private respondent. Whereas the petitioner submitted its bid on 20.09.2019, the private respondent submitted its bid on 21.09.2019 at 11:40 a.m. Initially, in terms of the Summary of Bid Opening of Part-1 Bids, the bids were uploaded on the Website on 23.09.2019. An objection was raised by the Evaluation Committee scrutinizing the tenders with regard to security submitted by the petitioner in the following terms:

> *"Cheques as submitted for bid security are not acceptable, valid instruments of bid security as per SBD may be submitted on or before 26.9.2019 upto 4 PM, otherwise bid shall be rejected."*

This is contained in Annexure P-7 appended with an earlier Writ Petition filed by the present petitioner, titled *M/s Amit Singla Vs. State of H.P. and others*, CWP No. 2688 of 2019 as well as running Page Nos. 229-230 of the paper-book of present petition.

12. Feeling aggrieved by the abovementioned observation of the Evaluation Committee, the petitioner approached this Court by way of CWP No. 2688 of 2019, in which, the petitioner primarily prayed for the following reliefs:

> *"(i) Issue a writ, order or direction especially a writ in the nature of Certiorari for quashing the Summary of Bid Opening of Part I Bids dated 23.09.2019 (Annexure P/7), passed by the respondent Nos. 3 to 8 whereby the Technical Bid submitted by the petitioner in response to the Notice Inviting Tender bearing Tender ID 2019_PWD_31309_1, Tender Reference No. PW.SRJ/TA/Pub/2019-*

5939-42 dated 19.08.2019 for the work of "Improvement & Strengthening of Thalout- Thachi km 0/0 to 34/0 (Section Thalout Panjain to Thachi km 0/0 to 25/0) (Job No.CRF-HP-2018-19-161) (SH:- ROFD/FC, M/T, CD Works, R/Wall, B/Wall, PCC V-Shape Drain, Parapets, Crash Barrier, Road Furniture, Rain shelter & sign Board)" (Anneuxure P/1) has been rejected as being illegal, arbitrary and contrary to the terms and conditions incorporated in the aforesaid Notice Inviting Tender as also the Standard Bidding Document Procurement of Civil Works (SBD) appended therewith;

(ii) Issue a writ, order or direction especially a writ in the nature of Mandamus for directing the Respondent No. 1 to withdraw the decision of its duly constituted Committee which had technically evaluated the bids submitted by the respective bidders, including the petitioner in response to the Notice Inviting Tender bearing Tender ID 2019_PWD_31309_1, Tender Reference No. PW.SRJ/TA/Pub/2019-5939-42 dated 19.08.2019 for the work of "Improvement & Strengthening of Thalout- Thachi km 0/0 to 34/0 (Section Thalout Panjain to Thachi km 0/0 to 25/0) (Job No.CRF-HP-2018-19-161) (SH:- ROFD/FC, M/T, CD Works, R/Wall, B/Wall, PCC V-Shape Drain, Parapets, Crash Barrier, Road Furniture, Rain shelter & sign Board)" and open the Financial Bid submitted by the petitioner and undertake the tender process strictly in accordance with the terms and conditions prescribed in the Notice Inviting Tender as well as the Standard Bidding Document Procurement of Civil Works (SBD) appended thereto;

(iii) a writ in the nature of mandamus for restraining the Respondent No. 1 from finalizing the tender process and awarding the work of "Improvement & Strengthening of Thalout- Thachi km 0/0 to 34/0 (Section Thalout Panjain to Thachi km 0/0 to 25/0) (Job No.CRF-HP-2018-19-161) (SH:- ROFD/FC, M/T, CD Works, R/Wall, B/Wall, PCC V-Shape Drain, Parapets, Crash Barrier, Road Furniture, Rain shelter & sign Board)" to any other bidder who had participated in the E-Tender Process during pendency of the instant petition in this Hon'ble Court."

13. Said Writ Petition was disposed of by this Court vide judgment dated 01.10.2019 in the following terms:

"Notice. Mr. J.K. Verma, learned Additional Advocate General, appears and accepts service of notice on behalf of the respondents.

On hearing this matter for sometime, this Court is prima facie satisfied that the bid security amount to the tune of Rs.41,99,000/- has not been deposited by the petitioner in terms with the contract agreement. Learned Additional Advocate General, on instructions received from Executive Engineer, Seraj Division, HPPWD Janjheli, District Mandi, H.P., has submitted that subject to all other

conditions in case this amount is deposited by the petitioner during the course of the day, by way of an instrument, assuring the payment thereof on demand to respondent No. 3, the Chief Engineer, HPPWD Mandi Zone, District Mandi, Himachal Pradesh, by 8.00 p.m. today either at the office/residence, the petitioner will also be considered alongwith other bidders during further process which has to take place in this matter.

Learned counsel representing the petitioner submits that the amount in question will be deposited today itself, in terms of tender document by 8 p.m. at the office/residence of respondent No. 3.

In view of the above and relief sought in this writ petition, nothing survives in this petition to be decided on merits. The same is accordingly disposed of with the above observations. Pending application(s), if any, shall also stand disposed of."

A copy of the said judgment is on record as Annexure P-5.

14. Thereafter, vide Annexure P-16, the bid of the petitioner has been rejected on the ground that the bidder does not meet the minimum qualification criteria of bidding documents. Simultaneously, the bid of the private respondent has been held to be meeting the minimum qualification criteria and bidding documents by the Evaluation Committee.

15. Feeling aggrieved, the petitioner has filed this writ petition praying for the reliefs already enumerated hereinabove.

16. Mr. Shrawan Dogra, learned Senior Counsel appearing for the petitioner has argued that the act of the respondent-department of declaring the bid of the petitioner to be bad on account of not meeting the minimum qualification criteria of the bidding document is arbitrary and discriminatory because respondent-department has always been biased in favour of the second bidder and the entire intent of the department was to somehow oust any other bidder so as to ensure that there was no competitor for the second bidder, i.e. the private respondent in the present petition. To substantiate his contention, Mr. Dogra has argued that the act of extending the date of online submission of bid from 20.09.2019 to 21.09.2019 by issuing a corrigendum was an arbitrary act which was done by the department just to accommodate the private respondent as said bidder was not in a position to submit its bid by 20.09.2019. Mr. Dogra has argued that the corrigendum dated 20.09.2019 (Annexure P-2) did not disclose as to what were the administrative exigencies, on account of which the date of bid was changed from 20.09.2019 to 21.09.2019 and the very fact that after the extension of date for submission of bid, it was only the private respondent who submitted its bid, this clearly demonstrates that extension of date of bid submission was tailor made act of the department to facilitate the private respondent herein to submit its bid. He has further argued

that initially holding of the security bid submitted by the petitioner to be invalid by the respondent-department also demonstrates that the department was biased against the petitioner and it was only due to the intervention of this Court in the earlier petition filed by the petitioner that the technical bid of the petitioner was considered by the department. Mr. Dogra has further argued that as the petitioner was apprehending that the department was outrightly biased in favour of the private respondent and there was each and every likelihood of the bid of the petitioner being rejected to accommodate the private respondent, the petitioner made a communication to the Employer vide Annexure P-7, dated 09.10.2019, in which inter alia apprehensions that the department was biased against the petitioner-firm and was bent upon to favour the private respondent, were raised. Mr. Dogra has drawn the attention of the Court to communication dated 11.10.2019 (Annexure P-8) addressed by the Employer to the petitioner vide which the petitioner was called upon to clarify its position on the points mentioned therein on the pretext that during the process of technical evaluation, the Evaluation Committee had decided to give an opportunity to the petitioner to clarify its position on the points mentioned in this letter. The argument of Mr. Dogra is that whereas vide this communication dated 11.10.2019, the petitioner was called upon to clarify its position within five days therefrom, the biasness of the employer can be guaged from the fact that this communication was posted on 19.10.2019 and was received by the petitioner only on 22.10.2019. Mr. Dogra submitted that in this background, vide communication dated 22.10.2019, the petitioner called upon the employer to grant five working days till 30.10.2019 to submit its response to the abovementioned communication. Mr. Dogra has also drawn the attention of this Court to communication dated 30.10.2019 (Annexure P-11), vide which, according to Mr. Dogra, all the queries which stood raised in communication dated 11.10.2019 (Annexure P-8), were satisfactorily responded to by the petitioner. In order to substantiate the factum of biasness of the Employer, Mr. Dogra has also drawn the attention of this Court to Annexure P-12, which is a communication dated 26.10.2019, vide which, in response to the letter of the petitioner dated 22.10.2019, the petitioner was called upon to submit its response by 28.10.2020 to communication dated 11.10.2019, which communication as per Mr. Dogra, was itself posted on 29.10.2019, i.e. a day after the petitioner was supposedly required to submit its response to communication dated 11.10.2019 (Annexure P-8). Referring to the ground of rejection as are contained in impugned communication Annexure P-16, i.e. proceeding of Evaluation Committee, Mr. Dogra has argued that the petitioner could not have been declared technically unqualified because the petitioner was fulfilling the technical criteria to be eligible for being considered as having qualified the technical bid because Clause 25 of the notice inviting bids contained the word “minimum” and the petitioner was fulfilling the

minimum criteria to enter the zone of consideration. Mr. Dogra has further argued that Evaluation Committee has given a complete go-bye to the special conditions which are mentioned on the back of Annexure-II, i.e. "List of Plant and Equipment to be deployed on Contract Work" which envisaged that the Committee was to verify the ownership proof of the plant and equipment as per Annexure-II during technical evaluation and in case of any doubt, the Committee authorised by the Employer would physically check all the machinery required for technically qualified bidder. Mr. Dogra has further argued that Para 4.7 of Section-1 of the Notice Inviting Bids, which dealt with disqualification demonstrates that the petitioner was not suffering from any of the disqualification mentioned therein and this aspect of the matter had also been ignored by the Evaluation Committee while rejecting the technical bid of the petitioner. He has also argued that in the reply which has been filed by the Employer to the writ petition, there is no cogent explanation given as to why the date of submission of the online bid was extended from 20th September to 21st September, 2019 and further the allegation against the petitioner that it had not completed two works allotted to it in Kalpa Division was not only factually incorrect but the mode and manner in which the information was collected by the Employer at the back of the petitioner to its deterrent from the officer concerned at Kalpa also demonstrates the biasness of the Employer against the petitioner. On these basis, Mr. Dogra has argued that as the petitioner was not fairly treated and further as there was arbitrary extension of the date of submission of the bid to accommodate the private respondent and further as the employer was biased against the petitioner and in favour of the private respondent, the petition be allowed and after declaring the petitioner technically qualified, the Employer be directed to proceed with the opening of the financial bid.

17. Opposing the petition, Mr. Ashok Sharma, learned Advocate General has argued that the petition has no merit and the allegation of the petitioner that the technical bid of the petitioner stood rejected arbitrarily was completely incorrect as the bid of the petitioner was rejected by the Evaluation Committee after objective evaluation of the same and after rightly coming to the conclusion that the same did not meet the minimum qualification criteria of bid document. Learned Advocate General has argued that the date of submission of the bid was extended by the department on account of administrative exigency and as this extension did not cause any prejudice to the petitioner nor it had acted to the deterrent of the petitioner, therefore, the petitioner was not having any locus to assail the same. Learned Advocate General has further argued that earlier also a writ petition against the shortcomings which were pointed by the Evaluation Committee in the Security submitted by the petitioner was filed by the petitioner, in which, there was no such relief claimed by the petitioner and therefore also, this plea is now barred by the principle contained in Order 2, Rule 2 of the Civil

Procedure Code. Learned Advocate General by exhaustively referring to various Clauses of the Notice Inviting Bids as well as other documents on record has argued that as the technical bid of the petitioner was not meeting the minimum qualification criteria of bidding documents, therefore, the bid of the petitioner was rightly rejected by the department. Learned Advocate General has argued that list of the plant and equipments to be deployed on contract work, as supplied by the petitioner, was not in consonance with "Annexure-II" of the Notice Inviting Bids as the petitioner was neither having "Batch Mix Plant" nor a "Track Mounted Mobile Stone Crusher machinery" as per the requirement of the Employer. He argued that as these were the essential conditions of the Contract/Notice Inviting Bids, which were not complied with by the petitioner, therefore, the technical bid of the petitioner was rightly rejected because the bid of the petitioner was in fact a non-responsive bid. He further submitted that the response which was filed by the petitioner to communication dated 11.10.2019, itself speaks volumes that the petitioner was neither owning nor was having assured ownership of the equipments which were required to be deployed on contract work as on the date when the bid was submitted by the petitioner. He has drawn the attention of the Court to reply dated 30.10.2019 filed by the petitioner and by referring to the annexures appended thereto, he submitted that documents which were later on submitted by the petitioner to demonstrate that he had plant and equipments to be deployed on contract work, were misleading, as fact of the matter remained that as on the date when the bid was submitted by the petitioner, he was neither owning nor having assured ownership of the plant and equipments. Learned Advocate General has further argued that kind of plant and equipments to be deployed on contract work was for the Employer to decide and in this case, whereas on one hand the petitioner was not having the plant and equipments to be deployed on contract work as required by the Employer, yet the petitioner had the audacity to say that the plant and equipments at the disposal of the petitioner were good enough for the purpose of the execution of the contract work without appreciating that it was not the satisfaction of the petitioner which was paramount but that of the Employer whose work was to be executed. Learned Advocate General has also argued that it was a matter of record that the works allotted to the petitioner in Kalpa Division were not being executed by him in terms of the agreement entered into and in this regard, the information which was sought by the Employer from the officer concerned, was *bonafidely* sought to ensure that the prospective bidder was having good credentials to carry out the work and there was no need to associate the petitioner in this regard. Learned Advocate General also argued that contention of the petitioner that its security bids were also arbitrarily rejected by the Evaluation Committee and it was only on account of intervention of this Court that the petitioner was allowed to participate in the bid is factually incorrect because a perusal of the

judgment passed by this Court in the earlier petition filed by the petitioner would demonstrate that the Court had also observed that the security deposited by the petitioner was not proper, yet it was the State which made a statement before the Court that if the petitioner was to rectify the defects with regard to the deposition of the security amount, the petitioner will be permitted to participate in the process and it was on the basis of the statement of the respondent-State that the petition was disposed of. On these basis, it has been urged by learned Advocate General that such petition is without any merit and the same be dismissed accordingly.

18. Mr. J.S. Bhogal, learned Senior Counsel appearing for the private respondent while adopting the arguments of learned Advocate General has argued that the plea of extension of time with regard to submission of technical bids by the Employer cannot be permitted to be agitated by the petitioner by way of this writ petition because had the petitioner been really aggrieved by the extension of time, then it should have had raised this issue in the earlier writ petition filed by it. As per Mr. Bhogal, failure on the part of the petitioner to do so in the earlier writ petition now bars it from raising this plea under the provisions of Order 2, Rule 2 of the Code of Civil Procedure. He has further argued that even otherwise the extension of time to submit the technical bid did not in any manner prejudice the petitioner and as the petitioner was not having machinery at the time when it submitted its bid, the technical bid of the petitioner has been rightly rejected by the Evaluation Committee. Mr. Bhogal has also argued that Court cannot sit on the judgment over the decision of the Evaluation Committee because the role of the Court, as defined by various judgments of Hon'ble Supreme Court, is that the Court in such like matters is to see the "legality" of the decision of the Evaluation Committee and not the "soundness" of the decision of the Evaluation Committee. Mr. Bhogal has also argued by referring to Annexure P-11 i.e. communication dated 30th October, 2019 made by the petitioner to the Employer that it stood established from this communication that on one hand the petitioner was not having the equipments as was demanded by the Employer and on the other hand, the petitioner was making a conditional offer that in case the contract work was awarded to it, then a party who is owner of the equipments as was desired by the Employer, had consented to provide the petitioner on hire basis, provided the work was allotted to it. Mr. Bhogal submitted that as the offer of the petitioner was conditional one, therefore, also the same was otherwise also liable to be rejected. On these basis, he has argued that the petition be dismissed with costs.

19. During the course of arguments, learned counsel for the parties relied upon various judgments of the Hon'ble Supreme Court with regard to the scope of judicial review. As majority of those judgments relied upon find mention in one of the latest judgment of the Hon'ble Supreme Court in Silppi Constructions Contractors Vs. Union of India and another

2019 SCC OnLine SC 1133, therefore, for the sake of brevity, the law as has been declared by Hon'ble Supreme Court in this regard, as reiterated in Silppi Constructions case *(supra)* is being quoted hereinbelow:

> *"7. In Tata Cellular vs. Union of India, 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., 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., 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 KSIIDC Ltd. vs. Cavalet India Ltd.4 it was held that while effective steps must be taken to realise the maximum amount, the High Court exercising its power under Article 226of 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.5 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.6 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 Orissait 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. 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. it was held that a mere disagreement with the decision-making 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.10 it was held that where a decision is taken that is manifestly in consonance with the language of the tender document or sub-serves 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. 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 re-doing the entire work.

18. Most recently this Court inCaretel Infotech Limited vs. Hindustan Petroleum Corporation Limited observed that a writ petition underArticle 226of 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 clear-cut 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."

20. Similarly, in ***Bharat Coking Coal Ltd. and others*** Vs. ***AMR Dev Prabha and others*** 2020 SCC Online SC 335, the Hon'ble Supreme Court has again reiterated as under:

29. The scope of judicial review in tenders has been explored in-depth in a catena of cases. It is settled that constitutional courts are concerned only with lawfulness of a decision, and not its soundness. Phrased differently, Courts ought not to sit in appeal over decisions of executive authorities or instrumentalities. Plausible decisions need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon.5 However, allegations of illegality, irrationality and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills. This is especially true given our unique domestic circumstances, which have demonstrated the need for

judicial intervention numerous times. Hence, it would only be the decision-making process which would be the subject of judicial enquiry, and not the end result (save as may be necessary to guide determination of the former).”

21. I have heard learned counsel for the parties and have also gone through the pleadings carefully as well as the judgments relied upon by learned counsel for the parties.

22. Annexure P-16 is the impugned communication, vide which the Evaluation Committee has rejected the bid of the petitioner on the ground that bidder does not meet the minimum qualification criteria of bidding document. A perusal of the said proceedings of the Evaluation Committee demonstrates that the Evaluation Committee while coming to the conclusion that the bidder did not meet the minimum qualification criteria of the bidding document, observed as under:

(A) *Representation/complaint received from one of the bidder M/s Amit Singla vide letter No. AS/HPPWD-MZ/2019-20.10.02 dated 9th October, 2019 has also been considered and opportunity has been afforded to the bidder vide this office letter No. PW-CE(MZ) CTR-1/2019-13757 dated 11.10.2019. Reply received from M/s Amit Singla vide letter AS /HPPWD-MZ/ 2019-20 /10/07 dated 30.10.2019 has also been gone through and after detailed deliberation following has been concluded:-*

1. The bidder’s submission that Batch Mix Plant for item No. 16 (P/L bituminous concrete with 100-120 TPH batch type hot mix plan---) is a part of financial bid & not a part of the qualifying criteria of technical bid is not tenable as bidding documents alongwith BOQ was uploaded and made available on the website and it is clear that batch mix plant for bituminous work is required and the same is required to be technically assessed as per Clause 4.5.5 (equipment capability). The bidder has not uploaded any document regarding ownership of batch mix plant for bituminous concrete item. The bidder after opening of technical bid has submitted the undated undertaking from M/s. NH Construction Pvt. Ltd. Vide his aforesaid letter dated 30.10.2019 regarding leasing out the batch mix plant on hire basis for execution of work which is on plain paper and without any reference and date.

2. The bidder’s submission that invoice No. INV-00561 dated 19.07.2019 as uploaded by M/s Amit Singla for crusher is in consonance with requirement of track mounted mobile stone crusher is false as nothing in the invoice has been mentioned regarding track mounted stone crusher. Moreover submission of the bidder that the crusher is wheel mounted is also not mentioned anywhere in the invoice. Further as per MORTH specification for road and bridge works vide clause 116. Section 100 regarding crushed stone aggregates “where the terms crushed grave/ Shingle crushed stone, broken stone,

or stone aggregate appear in any part of the contract Documents or Drawings issued for work, they refer to crushed gravel crushed shingle/crushed stone aggregate obtained from integrated crushing plant having appropriate primary crusher, secondary cone crusher, vertical shaft impactor and vibratory screen unless specified otherwise. Stone retained on 4.75 mm sieve shall have at least two faces fractured. Bidder have not submitted any documentary proof for the same and have no knowledge about it. The bidder after opening of technical bid has submitted the undertaking from M/s. NH Construction Pvt. Ltd. Vide his aforesaid letter dated 30.10.2019 regarding leasing out Roljack Jaw Crusher (Track Mounted Mobile Stone Crusher) on hire basis for execution of work which is on plain paper and without any reference and date.

3. Executive Engineer, Kalpa Division (B & R) HP PWD, Kalpa vide his letter No. PW/KNR/DB/PMGSY/2019-8339-40 dated 01.11.2019 has submitted in response to this office email dated 30.10.2019 that the performance of the bidder M/s Amit Singla in respect of following two packages/work is as under:-

(i) For package No. HP-05-44, the overall percentage/performance of work done till date is 9% only whereas fourteen month period has been elapsed against the allowed period of 17 months.

(ii) For package No. HP-05-42, the overall percentage/performace of work done till date is 13% only whereas fourteen month period has been elapsed against the allowed period of 17 months.

4. The bidder has written a letter dated 09.10.2019 to the office prior to the evaluation of technical bid with the intention of influencing the bidding process which is quite unwarranted before he publishing of technical evaluation report and in this way, he has violated the Clause No. 24 of the bidding document."

(B)

19.4.5.5		Equipment Capabilities:-	M/s Amit Singla, Sole Prop Sh. Amit Singla Booth No. 23, Sector 27D, Chandigarh.	M/s Garg Sons Estate Promoters, Pvt. Ltd. House No. 260, Sector 9-C, Chandigarh.
	1	Recylcer/Stabliser	1 No.	1No.
	15	Tipper Truck	15 No. (Owned/hired)	15 No.
	3	Motor Grader	3 No. (Owned/hired	3 No.
	2	Front end Loader	4 No. (owned/hired)	2 No.

	3	Smooth Wheeled Roller	3 No. (owned/hired)	3 No.
	2	Vibratory Roller	3 No. (owned)	2 No.
	1	Batch Mix Plant	Not attached	1 No.
	1	Paver finisher with Electronic Sensor	1 No.	1 No.
	4	Water Tanker	4 No.	4 No.
	1	Bitumen Sprayer	1 No.	1 No.
	2	Tandem Roller	2 No. (owned/hired)	2 No.
	2	Concrete Mixers with Integral weigh Batching facility	2 No.	2 No.
	1	Track Mounted Mobile Stone crusher	Not attached	1 No.

23. At this stage, it is necessary to refer to the Instructions to the Bidders, as were contained in the Bid Document. Para-9 of the Invitation for Bids provided that the bid documents consisting of qualification information and eligibility criterion for bidders, plans specifications, drawings, the schedule of quantities of the various classes of work to be done and the set of terms and conditions of contract to be complied with by the contractors can be seen on website https://hptendersgov.in and scanned copies of the required documents and information as per Section 2 (Formats and Annexure) should be attached in the Technical Bid as prescribed in SBD. Similarly, Para-12 thereof provided that conditional bids and the bids not meeting the qualification criteria on the date of receipt of bids shall be summarily rejected.

Now specifically coming to Section-1 of the Invitation for Bids, i.e., Instructions to Bidders, Para- 4.3 of Para-4 which dealt with Qualification of the Bidder provided that all bidders shall include the information and documents mentioned therein below with their bids in Section 2.

24. Similarly, Para 4.5, which dealt with Qualification Criteria, provided that qualification will be based on applicant's meeting the minimum pass/fail criteria regarding the applicant's general and particular experience, personnel and equipment capabilities etc., as demonstrated by the Applicant's responses in the forms attached to the Letter of Application.

25. Para 4.5.5. thereof, which dealt with the Equipment Capabilities, envisaged that the applicant should own or should have assured ownership to the following key items of equipment, in full working order, and must demonstrate that, based on known commitments; they will be available for use in the propose contract. Following "Key Items of

Equipments" stand referred in Annexure-II of the Invitation for Bids, which is again being reproduced hereinbelow:

"Annexure-II

List of Plant & Equipment to be deployed on Contract Work

(Reference Cl. 4.5.5)

Sr. No.	Type of Equipment	Maximum age as on	Up to Rs. 50 Million	Rs.51-200 Million	Rs.201-500 Million	Rs.501-1000 Million & above
1.	Recylcer/Stabliser	2	-	-	1	-
2.	Tipper Truck	5-7	-	-	15	-
3	Motor Grader	5	-	-	3	-
4.	Front end Loader	5	-	-	2	-
5.	Smooth Wheeled Roller	5	-	-	3	-
6.	Vibratory Roller	5	-	-	2	-
7.	Batch Mix Plant	5	-	-	1	-
8.	Paver finisher with Electronic Sensor	5	-	-	1	-
9.	Water Tanker	5	-	-	4	-
10	Bitumen Sprayer		-	-	1	-
11	Tandem Roller	5	-	-	2	-
12	Concrete Mixers with Integral weigh Batching facility	5	-	-	2	-
13	Track Mounted Mobile stone crusher	5	-	-	1	-

26. Now, in this background, this Court will refer to the infirmities, which stand pointed out in Annexure P-16 by the Evaluation Committee in the bid of the petitioner.

27. As per the Evaluation Committee, the list of Equipment Capabilities vis-a-vis Batch Mix Plant were not attached by the petitioner and similarly list of Equipment Capabilities qua Track Mounted Mobile Stone Crusher was also not attached by the petitioner.

28. The Evaluation Committee further held that the contention of the petitioner that the Batch Mix Plant for Item No. 16 was a part of Financial Bid and not part of qualifying criteria of technical bid was not tenable as bidding documents alongwith BOQ was uploaded and made available on the website, which made it clear that batch mix plant for

bituminous work was required and the same was required to be technically assessed as per Clause 4.5.5 (Equipment Capability).

29. The Committee also observed that the petitioner had not uploaded any document regarding ownership of batch mix plant for bituminous concrete item. Petitioner after opening of technical bid had submitted undated undertaking from M/s. NH Construction Pvt. Ltd. vide letter dated 30.10.2019 regarding leasing out the batch mix plant on hire basis for execution of work which was on plain paper and without any reference and date.

30. The Evaluation Committee also observed that petitioner's submission that invoice No. INV-00561 dated 19.07.2019, as uploaded by it for crusher was in consonance with requirement of track mounted mobile stone crusher was false as nothing in the invoice had been mentioned regarding track mounted stone crusher. Moreover submission of the petitioner that the crusher was wheel mounted was also not mentioned anywhere in the invoice.

31. The Committee also observed that as per MORTH specification for road and bridge works vide Clause 116, Section 100 regarding crushed stone aggregates "where the terms crushed grave/ Shingle crushed stone, broken stone, or stone aggregate appear in any part of the contract Documents or Drawings issued for work, they refer to crushed gravel crushed shingle/crushed stone aggregate obtained from integrated crushing plant having appropriate primary crusher, secondary cone crusher, vertical shaft impactor and vibratory screen unless specified otherwise. Stone retained on 4.75 mm sieve shall have at least two faces fractured. The Committee also observed that the petitioner had not submitted any documentary proof for the same and had no knowledge about it. The petitioner after opening of technical bid had submitted the undertaking from M/s. NH Construction Pvt. Ltd. vide letter dated 30.10.2019 regarding leasing out Roljack Jaw Crusher (Track Mounted Mobile Stone Crusher) on hire basis for execution of work which was on plain paper and without any reference and date.

32. The Committee also observed that the Executive Engineer, Kalpa Division (B & R) HP PWD, Kalpa vide letter No. PW/KNR/DB/ PMGSY/2019-8339-40, dated 01.11.2019 had submitted in response to the email of the office of the employer that qua package No. HP-05-44, the overall percentage/performance of work done by the petitioner was 9% only till the relevant date, whereas 14 months period had elapsed against the allowed period of 17 months and for package No. HP-05-42, the overall percentage/performance of work done till the relevant date was 13% only, whereas 14 out of 17 months period had elapsed.

33. The Committee also observed that the petitioner had written a letter dated 09.10.2019 to the office prior to the evaluation of technical bid with the intention to

influence the bidding process which was unwarranted before the publishing of technical evaluation report and, thus, the petitioner had violated Clause No. 24 of the bidding document.

34. Now, the Court will straightway refer to Communication dated 9th October, 2019 (Annexure P-7), addressed by the petitioner to the employer.

35. It stood mentioned in this Communication that the petitioner intended to raise an objection against the biased behaviour of the Department against the petitioner, as the Department had tried its best to oust the petitioner-Firm from the tender process earlier by not accepting its bid security in the form of Certified Cheques, which was in absolute violation of Clause 16.1 of the Standard Bidding Document and was allowed to submit the security by way of FDR only, pursuant to order dated 01.10.2019, passed by the High Court of H.P. in CWP No. 2688 of 2019.

36. It was further mentioned in this Communication that though the petitioner had quoted very competitive rates and was hopeful of being allotted that said work, but the Department was "hell-bent" of favouring the second bidder. It also stood mentioned in this Communication that during the earlier tendering process, the petitioner stood disqualified on the basis that Recycler bought by it was hypothecated by their seller and Note had been taken for non-performance of its two works in Kalpa Division. Petitioner also mentioned in this Communication that as per its knowledge, there was no slow progress of work being executed by it in Kalpa Division and that it had sent a Communication to Kalpa Division and informed that a re-tender for the subject work had to be carried out and that the petitioner be informed about non-performance of its work in Kalpa Division.

37. It was further mentioned in this Communication that the Department had tried its best to eliminate the petitioner from its tendering process and that there was a bias towards the second bidder, which was evident from the fact that the date of submission of tender was revised from 20.09.2019 to 21.09.2019, just to accommodate the second bidder, as there was no reason available with the Department to extend the date of submission of tender.

38. It was further mentioned in this Communication that the Department was working tooth and nail to disqualify and eliminate the petitioner from the bidding process and there was no reason for the Department to cancel the tender process.

39. It was finally mentioned in this Communication that the Department should conduct the tender process in a fair manner so as to save any unnecessary and exponential loss to the State exchequer.

40. There is on record as Annexure P-8 a Communication dated 11.10.2019, addressed by the Chief Engineer (MZ), HPPWD, Mandi to the petitioner, which reads as under:

"M/s Amit Singla,
Plot No. 38-B, Industrial Area,
Phase-II, Chandigarh.

Subject: Tender for the work "Improvement & Strengthening of Thalout- Thachi-Somgad Road km 0/0 to 34/0 (Section Thalout Panjain to Thachi km 0/0 to 25/0) (Job No.CRF-HP-2018-19-161) (SH:- ROFD/FC, M/T, CD Works, R/Wall, B/Wall, PCC V-Shape Drain, Parapets, Crash Barrier, Rain Shelter, Sign Board and Road Furniture etc.) under CRF.

The tender for the subject cited work is under process of technical evaluation. After detailed deliberation, it has been decided by the evaluation committee that an opportunity be afforded to you to clarify your position on the following points:-

1. Invoice-cum-delivery challan for Batching Plant-CP1881518900 costing Rs.23,75,000/- as uploaded by you doesn't seem to be as per requirement of item No. 16 (P/L bituminous concrete with 100-120 TPH batch type hot mix plant…..).

2. Tax invoice No.INV-000561 dated 19.07.2019 as uploaded by you doesn't seem to be as per requirement of Track mounted mobile stone crusher as provided in the bid document.

3. You have been blacklisted by the Managing Director, H.P. Agro Industries Corp. Ltd. Vide Notification No. AIC/BD/2008=09/Tender-704 to 709 dated 18.10.2008 and also debarred by the Engineer-in-Chief, HPPWD, Shimla vide letter No. 17708-16, dated 30.12.2008 for participation in the tenders in future in HPPWD. It may be clarified whether the above orders have been revoked or not.

4. A note has also been taken for your non-performance in respect of two works awarded to you by Executive Engineer, Kalpa Division, HPPWD, Kalpa bearing package No. HP-05-42 and HP-05-44.

5. The committee has observed that your letter dated 09.10.2019 is an attempt to impede the Technical Evaluation process which is clear violation of Clause 24 (Process to be confidential) of Standard Bidding Documents, Section-1:Instructions to bidders. The committee has taken serious view on your letter dated 09.10.2019 and is of the view that this letter on your part is an effort to influence the process of technical Evaluation by Employer in free, fair and impartial manner.

You are therefore directed to clarify your position on the above points within five days failing which your bid is liable to be rejected.

Chief Engineer (MZ),
HPPWD, Mandi."

41. Response to this communication is available on record as Annexure P-11, dated 30th October, 2019.

42. With regard to Point No. 1, the response of the petitioner was that the issue raised by the employer vide Point No. 1 was a part of financial bid and not a part of qualifying criteria or technical bid. It was further mentioned in response thereto that the petitioner had already shown ownership of a Cement Batch Mix Plant and "the petitioner was also submitting an undertaking from the owner of a similar Batch Mix Plant, as desired, as per letter dated 11.10.2019." It was further mentioned in this para that the undertaking clearly stated that if the petitioner was awarded the work, then the Company in issue had undertaken that a Batch Mix Plant shall be given on hire basis to the petitioner-Firm till the completion of work.

43. With regard to Point No. 2, it stood mentioned by the petitioner that the crusher machine jaw, plate for stone crusher machine with conveyor belt and idler roller were fully in consonance with the requirement of Track Mounted Mobile Stone Crusher, as provided in the bid document and the only difference between the invoice provided by the petitioner and the requirement of the tender was that the Crusher of the petitioner was Wheel Mounted, whereas, the employer has asked for a Track Mounted Crusher.

44. Petitioner further mentioned in Para-2 of the response that the mode of mounting of the crusher will have no impact on the output of the crusher, rather the Wheel Mounted Crusher will be more portable for a work to be executed for almost 25 Kms. It was further mentioned that the petitioner was annexing ownership proof and an undertaking of the Firm, which had consented to provide the petitioner with said crusher on hire basis, provided the work was awarded to the petitioner.

45. With regard to the points raised in Para-3 of Communication dated 11.10.2019, the stand of the petitioner was that the issue of blacklisting of the petitioner by the Managing Director, H.P. Agro Industries Corporation Ltd. was decided by the High Court of H.P. and the same was no more an issue.

46. With regard to the contents of Para-4 of the Communication of the employer, the petitioner had stated that there was no non-performance of the two works awarded to the petitioner by the Executive Engineer, Kalpa Division and the petitioner had also sought a clarification in this regard from the concerned Executive Engineer, which had not been given to the petitioner.

47. With regard to Para-5 of the Communication dated 11.10.2020, the petitioner had mentioned that it was only pointing out its concern as per the information

received by it and the Communication dated 09.10.2019 was not a violation of Clause-24 of the Notice Inviting Tender.

48. This Court would like to pause at this stage itself, because from the facts which stand narrated hereinabove, in the considered view of this Court, the findings returned by the Evaluation Committee that the Technical Bid of the petitioner was not meeting the minimum qualification criteria of bidding document, were correct findings. This Court is holding so for the following reasons. The relevant Clauses of the Notice Inviting Bids have already been quoted by the Court in above paras of the judgment in extensio. It is clear from the relevant Clauses of the Notice Inviting Bids that the conditional bids and the bids not meeting the qualification criteria on the date of receipt of bids were liable to be rejected and bid documents consisting of qualification information and eligibility criterion were to be attached in the Technical Bid, as prescribed in SBD as per Section-2 (Formats and Annexures). Para-4 of Section-1 of the Instructions to Bidders, which dealt with Qualification of the Bidder, clearly provided that if the employer had not undertaken pre-qualification of potential bidders, all bidders shall include the information and documents in their bids in Section 2, as mentioned in para-4.3. Thus, in terms of para-4.3(d), it included "major items of construction equipment proposed to carry out the Contract". Similarly, para-4.5, which dealt with Qualification Criteria provided that qualification of the applicant was to be based on, *inter alia*, equipment capabilities of the applicant. Para-4.5.5, which dealt with Equipment Capabilities, provided that the applicant should own or should have assured ownership of the Key Items of equipment in full working order and must demonstrate that, based on known commitments, they will be available for use in the proposed contract. The suggested list of Key Items of equipments is in terms given in Annexure-II, which also mentions "Batch Mix Plant" and "Track Mounted Mobile Stone Crusher". The proceedings of Evaluation Committee (Annexure P-18), vide which, the bid of the petitioner has been rejected, demonstrates that the Evaluation Committee, *inter alia*, concluded that the petitioner was neither having "**Batch Mix Plant" nor was it having "Track Mounted Mobile Stone Crusher**". In my considered view, as admittedly, the petitioner was neither having "Batch Mix Plant" nor "Track Mounted Mobile Stone Crusher" by way of either ownership or hire ownership at the time when the bid document was submitted by the petitioner, the bid of the petitioner was not a responsive bid. The factum of the petitioner not possessing these essential equipments is evident from the contents of Annexure P-11, dated 30th October, 2019, written by the petitioner to the employer while answering some of the observations made by the Evaluation Committee.

49. The stand of the petitioner that the requirement of a Batch Mix Plant could not be said to be a part of Technical Bid, but a part of a Financial Bid, is completely

baseless. It is common knowledge that bids comprise of two parts: (a) Technical Bid; and (b) Financial Bid. After the prospective Bidders respond to the Notice Inviting Bids, then first the Technical Bids are opened and if the Bidders are found technically qualified to execute the work, then the Financial Bids are opened. While evaluating the Technical Bids, generally the Evaluation Committee evaluates as to whether the prospective Bidders in issue are technically qualified to execute the work and besides experience etc., they have necessary machinery at their disposal to execute the work or not. Whether or not the prospective bidder has necessary machinery etc. to execute the work, is obviously a part of Technical Bid and the same is not a part of Financial Bid, as is the case of the petitioner.

50. Besides this, in its Communication dated 30th October, 2019, the petitioner in so many words has admitted that it neither had a Batch Mix Plant nor it had Track Mounted Mobile Stone Crusher, either at the time when it submitted its bid or at the time when it was responding to the queries of the Evaluation Committee. Incidentally and interestingly, the petitioner has expressly mentioned in this Communication with regard to these two machineries that in the event of the contract being awarded to it, then it was having undertakings from the owners of such like machinery that the machinery shall be given to the petitioner on hire for execution of the work.

51. A perusal of the undertakings, which were appended alongwith Annexure P-11 demonstrates, as has been pointed out by the learned Advocate General also, that the undertakings are undated. Though learned Senior Counsel for the petitioner had submitted that the factum of the undertakings being undated, is of no consequence, because reference of the work in issue has been mentioned therein, in my considered view, this does not improves the case of the petitioner, because the factum of the dates of undertakings not being there, leads to only one inference that such undertakings were not with the petitioner at the time when it submitted its bids, otherwise, in terms of the conditions of Notice Inviting Bids, it should have uploaded these undertakings with its tender.

52. Hon'ble Supreme Court in ***Vidarbha Irrigation Development Corporation Vs. Anoj Kumar Garwala***2019 SCC Online SC 89 has reiterated that essential conditions of a tender have to be strictly complied with and even the Employer has no power to condone such lack of strict compliance, as any such condonation would amount to perversity in the understanding or appreciation of the tender conditions, which then have to be interfered with by a Constitutional Court. Hon'ble Supreme Court has been pleased to specifically hold as under:

"15. The law on the subject is well settled.In Bakshi Security and Personnel Services Pvt. Ltd. v. Devkishan Computed Pvt. Ltd. and Ors., (2016) 8 SCC 446, this Court held:

"14. The law is settled that an essential condition of a tender has to be strictly complied with. In Poddar Steel Corpn. v.Ganesh Engg. Works [Poddar Steel Corpn. v. Ganesh Engg. Works, (1991) 3 SCC 273] this Court held as under: (SCC p. 276, para 6)

"6. ... The requirements in a tender notice can be classified into two categories—those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."

15. Similarly in B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. [B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd., (2006) 11 SCC 548] this Court held as under: (SCC pp. 571-72, para 66)

"(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;..."

16. We also agree with the contention of Shri Raval that the writ jurisdiction cannot be utilised to make a fresh bargain between parties."

16. However, learned counsel appearing on behalf of the appellant strongly relied uponAfcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818, and paragraphs 14 and 15 in particular, which state:

"14. We must reiterate the words of caution that

> ***this Court has stated right from the time when<u>Ramana Dayaram Shetty v. International Airport Authority of India</u> [<u>Ramana Dayaram Shetty</u>v. International Airport Authority of India, (1979) 3 SCC 489] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. In this context, the use of the word "metro" in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.***
>
> *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."*
>
> *17. 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."*

53. In view of the above legal position, the act of the Employer in this case of rejecting the Technical Bid of the petitioner on the ground that the same was not meeting the qualification criterion laid down in the Notice Inviting Bids, cannot be faulted with, as the employer has rightly rejected the bid of the petitioner, as petitioner was not technically qualified in terms of the conditions of the Notice Inviting Bids.

54. Accordingly, on the basis of the findings returned hereinabove, as this Court finds that the bid of the petitioner was a non-responsive bid, it finds no illegality in the act of the Evaluation Committee of rejecting the Technical Bid of the petitioner vide Annexure P-16.

55. With regard to the allegation of the petitioner that the entire process so undertaken by the Department was arbitrary, discriminatory and biased in favour of the private respondent, this Court holds that the petitioner has not been able to point out on the basis of any material on record that the private respondent was not technically qualified to participate in the process, yet the employer went out of the way to make the said bidder technically

qualified. As far as the allegation of the petitioner that the date of submission of online bid was arbitrarily extended from 20.09.2019 to 21.09.2020 is concerned, though this Court finds that neither in the Corrigendum, which was issued while extending the date, any reasons stood assigned as to why the same was done, nor in the reply to the petition, the reasons stand enumerated, however, as it is a matter of record that this act of the employer was not assailed by the petitioner either by way of earlier petition filed by it or immediately after issuance of the Corrigendum in issue, this Court concurs with the submissions made by learned Advocate General as well as learned counsel for the private respondent that the petitioner has no locus to raise this ground in this petition, on the analogy of the principles contained in Order II, Rule 2 of the Code of Civil Procedure. Once the plea which was available to the petitioner at the time when the earlier writ was filed, was not taken by it, then subsequently it is precluded from raising such plea in the subsequent petition.

56. Even the allegation of arbitrariness with regard to alleged rejection of the security amount submitted by the petitioner does not holds any water. A perusal of the judgment dated 01.10.2019, passed by this Court in CWP No. 2688 of 2019 (Annexure P-5) demonstrates that this Court had observed that prima facie it was satisfied that the bid security amount deposited by the petitioner was not in terms of the contract agreement. The petition was admittedly disposed of on the basis of instructions received by the learned Advocate General that subject to other conditions in case the security amount was deposited by the petitioner during the course of the day by way of instrument, assuring the payment thereof, then the case of the petitioner would be considered alongwith other bidders during further process.

57. As far as the allegation of the petitioner with regard to posting of Communications to the petitioner post the date vide which responses thereto were called for from the petitioner is concerned, in the considered view of the Court, as it is a matter of record that the response submitted by the petitioner to the queries of the Evaluation Committee was taken into consideration by the Evaluation Committee while rejecting the Technical Bid of the petitioner, too much cannot be read into it, save and except that the employer has to set its house in order to ensure that ministerial machinery is in sync with the administrative machinery of the office.

58. As far as the allegation raised by the petitioner with regard to the mode and manner in which reports were purportedly procured from the Executive Engineer of Kalpa Division is concerned, the Court is not making any observation qua the same for the simple reason that as this Court is convinced that the bid of the petitioner was not a responsive bid, as

petitioner was not having requisite equipments, which were required for the work in issue in terms of Notice inviting Bids, the Court is not venturing into other aspects of the matter.

59. Accordingly, 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. Interim orders, if any, stand vacated. No order as to costs.

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

Rajesh @ Surya ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 2187 of 2020
Date of Decision: 14th December, 2020

Indian Penal Code, 1860- Regular bail- Under section 376, 506, IPC- Section 4 POCSO Act- The purpose of sections 207 Cr.p c and subsequent supply of evidence to accused is to enable him to base his bail petition and Other such documents. Hon'ble Court accepted the prayer of Ld. Advocate General as genuine bonafide and Practical- that if documents are filed with petition- it will lend assurance about its correctness and in case of any tempering accountability can be fixed – It will offered opportunity to state to counter such documents in case of any lapse.

For the petitioner: Mr. Yashveer Singh Rathore and Prashant Sharma, Advocates.

For the respondent: Mr. Nand Lal Thakur, Additional Advocate General with Mr. Ram Lal Thakur, Advocate

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

The following judgment of the Court was delivered:

Anoop Chitkara, Judge (oral).

The petitioner, who is under incarceration in FIR No.90 of 2018 dated 26.7.2018 registered under Sections 376, 506, Indian Penal Code and Section 4 of POCSO Act, at Police Station Chopal, District Shimla for establishing coitus with a girl-victim aged 14 years has come up before this Court seeking regular bail.

2. Notice. Mr. Nand Lal Thakur, learned Additional Advocate General appears and accepts service of notice on behalf of the respondent-State.

3. While arguing the matter, Mr. Yashveer Singh Rathore, learned counsel for the petitioner wanted to draw attention of this Court to the statement recorded under Section 164, Cr.PC and

the statements recorded on oath. However, a perusal of this petition shows that no such documents have been annexed with the petition.

4. Mr. Nand Lal Thakur, Additional Advocate General submits that once the police files report under Section 173(2) Cr.P.C and Court supplies copy of the same to the accused in compliance to the report under Section 173(2) Cr.P.C, then the objective behind such supply is to make the accused aware of the prosecution laws against him.

5. Mr. Nand Lal Thakur, Additional Advocate General further submits that after framing of charges and recording of statements of witnesses, Court supply free copy of such statements to the accused. The purpose behind supplying free copy is that the accused is not condemned unheard and he has all material for ready reference.

6. At this stage, Mr. Yashveer Singh Rathore, learned counsel for the petitioner wants to handover 173(2) report to the Court. He submits that usually, the copy of the documents handed over by Court(s) to the accused are either faded or not legible. He further submits that the copy of documents received by him are over-written by various people and in case he files the same, the Registry will raise objections about its admissibility. The contention of Mr. Yashveer Singh Rathore is also equally right.

7. Mr. Nand Lal Thakur, learned Additional Advocate General submits that in case the petitioner hands over the copies of evidence and report under Section 173(2) Cr.P.C to the Court, then there is no assurance that the accused or anybody on his behalf has not taken out that document, which was unsuitable to him. Learned Additional Advocate General further states that in case such documents are filed alongwith the petition, it will lend assurance about its correctness and in case of any tempering, the accountability can be fixed. He further contends that it will afford them an opportunity to counter such documents in case of any lapses. The prayer of Nand Lal Thakur, Additional Advocate General is genuine, bonafide and practical.

8. During this Covid-19 pandemic, every time the police officers are called to this court alongwith case files. It is likely to put such officers at the risk of contacting Covid-19 disease. Be that as it may, the purpose of 207 Cr.PC and subsequent supply of evidence to the accused is to enable him to base his bail petition and other such documents. In the present case, learned counsel does not deny that he never received such documents.

9. Confronted with this, Mr. Yashveer Singh Rathore, learned counsel for the petitioner wants to withdraw the petition with liberty to file a fresh petition annexing all documents, which he may rely upon.

10. Given above, this petition is closed with liberty to the petitioner to file a fresh petition annexing those documents, which the petitioner may rely upon for the purpose of bail. It is clarified that even if such documents are faded or are not properly legible, still the Registry shall not raise any objection on that respect and shall list the same, as it is.

11. Thus, the petition is closed with the above observations. All pending applications, if any, stand closed.

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

1. Cr.MP(M) No.2195 of 2020
Binder Singh .....Petitioner
Versus
State of Himachal Pradesh .....Respondent

2. Cr.MP(M) No.2196 of 2020
Kaptan Singh .....Petitioner
Versus
State of Himachal Pradesh .....Respondent

3. Cr.MP(M) No.2197 of 2020
Mamta Devi .....Petitioner
Versus
State of Himachal Pradesh .....Respondent

4. Cr.MP(M) No.2198 of 2020

Leela Pati .....Petitioner
Versus
State of Himachal Pradesh .....Respondent

Cr.MP(M) Nos. 2195, 2196, 2197 and 2198 of 2020
Decided on: 18.12.2020

Indian Penal Code, 1860:-Section 306 IPC- Petitioner-daughter-in law of deceased lodged complaint against deceased and his family as a consequences of which deceased was under great mental pressure. Petitioner started residing separately on account of certain difference with her husband and his family members. Petitioner was not ready to settle her dispute amicably with her husband and his family member- her attitude can not be construed to be instigation- Petitioner being Aggrieved if any, on account of mental harassment and Cruelty is well within right to approach police or any court of law – That could not be reason for deceased to commit suicide. (Para 5).

Bail:- One is deemed to be innocent – till the time his /her guilt is proved in accordance with law- there appears no justification to curtail the freedom of bail petitioner indefinitely during trial especially-when nothing remains to be recovered from them (para 6)

Cases referred:
Prasanta Kumar Sarkar v. Ashis Chatterjee and Another (2010) 14 SCC 496;
Manoranjana Sinh Alias Gupta versus CBI 2017 (5) SCC 218;
Sanjay Chandra versus Central Bureau of Investigation (2012)1 SCC 49;

For the Petitioner(s) : Mr. Raj Negi, Advocate, through Video Conferencing.

For the Respondent(s). : Mr. Arvind Sharma, Additional Advocate General with Mr. Kunal Thakur, Deputy Advocate General, through Video Conferencing.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Sequel to order(s) dated 14.12.2020 passed by this Court in above captioned bail petitions, whereby petitioners were ordered to be enlarged on interim bail in connection with FIR No. 153 of 2020 dated 10.12.2020 under Section 306 read with Section 34 of IPC, registered with Police Station Rohru, District Shimla, HP, respondent-State has filed the status report prepared on the basis of investigation carried out by the Investigating Agency.

2. Record/status report made available to this Court reveals that on 10.12.2020, complainant Yashwant Singh, who happened to be son of the deceased, lodged a complaint at PS Rohru, District Shimla, stating therein that on 9.12.2020, at 8:00AM, his father had come towards Rohru alongwith his mother. Complainant disclosed to the police that his mother after getting herself checked up at private clinic and finishing his personal work in Cooperative Bank Rohru, came back to the village, but his father did not return and his mobile was also switched off. He alleged that on 10.12.2020, he along with his uncle Promod and cousin Robin went for the search of his father, who was subsequently found lying unconscious at a place called Khaatal and froth was coming out of his mouth. The complainant alleged that in the year, 2015, he had solemnized marriage with one of the bail petitioner Mamta, and out of their wedlock, one son was born, but on account of certain differences, she had started living separately. He alleged that on 28.11.2020, above named bail petitioner Mamta lodged a complaint at PS Rohru alleging therein that she is being harassed by her husband and in laws, as a consequence of which, police had come to his house. He also alleged that the bail petitioner Mamta had also registered case under Domestic Violence Act against him as well as other family members. He alleged that on 30.11.2020, bail petitioner Mamta alongwtih her parents had come to his house and abused the parents and as such, his father on 9.12.2020, went towards boundary of village Khaatal. Police also recovered suicide note from the pocket of deceased father of the complainant, wherein he had written that the bail petitioner Mamta and

her parents are responsible for his death. In the aforesaid background, FIR detailed herein above, came to be lodged against the above named bail petitioners.

3. Mr. Arvind Sharma, learned Additional Advocate General, while fairly admitting factum with regard to joining of investigation by the bail petitioners contends that though in terms of order passed by this Court, petitioners have joined the investigation, but keeping in view the gravity of offence alleged to have been committed by the bail petitioners, they do not deserve any leniency and as such, prayer made on their behalf for grant of bail may be rejected outrightly.

4. Having heard learned counsel for the parties and perused material available on record, this Court finds that bail petitioner Mamta, who happened to be daughter in law of the deceased had lodged some complaint at PS Rohru against the deceased and his family members, as a consequence of which, deceased was under great mental pressure. Investigation reveals that bail petitioner Mamta on account of certain differences with her husband and other members of family had started residing separately at Rohru, but during this period, certain complaints were lodged by her in the police as well as in the court of law under Domestic Violence Act. Though effort was made by the police as well as other relatives for amicable settlement inte-se parties, but as per investigation, bail petitioner Mamta was not ready to settle her dispute amicably with her husband as well as other family members.

5. Though suicide note allegedly recovered from the person of the deceased suggests that he committed suicide after being harassed and tortured by the bail petitioners, but that is not sufficient to conclude the complicity, if any, of the bail petitioners in the alleged crime because as per own statement of the complainant recorded under Section 154 Cr.C, his father was under tremendous pressure on account of registration of cases against him as well as other family members. Though there is mention in the status report that despite there being effort made by the respectable members of the family , bail petitioner Mamta was not ready to settle the matter, but that attitude, if any, of her cannot be construed to be instigation, if any, on her part to the deceased, who admittedly committed suicide after registration of cases against his son, and other family members. There is no evidence that bail petitioner prompted/instigated the deceased to consume poison for finishing his life. Otherwise also, she being aggrieved, if any, on account of mental harassment and cruelty is well within her rights to approach police or any court of law and that could not be a reason for the deceased to commit suicide.

6. Though aforesaid aspects of the matter are to be considered and decided by the court below on the basis of totality of evidence collected on record by the Investigating Agency, but having taken note of aforesaid aspect of the matter, there is no reason for custodial

interrogation of the bail petitioners, who have otherwise joined the investigation. Hon'ble Apex Court as well as this Court in catena of judgments have repeatedly held that one is deemed to be innocent till the time his/her guilt is proved in accordance with law and as such, there appears to be no justification to curtail the freedom of the bail petitioner indefinitely during trial especially, when nothing remains to be recovered from them

7. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr.,** decided on 6.2.2018, has categorically held that 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.***
>
> ***4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity***

to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.

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

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

" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty

must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

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

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

the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

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

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

12. Consequently, in view of the above, order(s) dated 14.12.2020, passed by this Court, is made absolute, subject to following conditions:

a. They shall make themselves 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. They shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;
c. They shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or the Police Officer; and
d. They shall not leave the territory of India without the prior permission of the Court.

13. It is clarified that if the petitioners misuse their liberty or violate any of the conditions imposed upon them, 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 cases and shall remain confined to the disposal of these applications alone.

The bail petitions stand disposed of accordingly.

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

Sanjay Kumar .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

Cr.MP(M) No.1944 of 2020
Decided on: 24.12.2020

Code of Criminal Procedure, 1973-Bail-439 Cr.P.C.- Sections 363, 366, 376 IPC- Section 6 POCSO Act- Victim aged 16.5 years – Victim and Bail petitioner known to each other for quite considerable time, meeting each other frequently- She on her volition ,without any external pressure joined the company of bail petitioner as per her statement under section 164 Cr.PC.- Medical officer opined that there was no genital or physical injury and there appears to be no use of force- Challan filled- Nothing remains to be recovered from bail petitioner- There appears no justification to let the bail petitioner incarcerate in jail for an indefinite period during trial.

For the Petitioner : Mr. Satyen Vaidya, Senior Advocate, with Mr. Vivek Sharma, Advocate, through Video Conferencing.

For the Respondent : Mr. Sudhir Bhatnagar, Additional Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioner namely Sanjay Kumar, who is behind the bars since 10.9.2020, has approached this Court in the instant proceedings filed under Section 439 of Cr.PC., for grant of regular bail in case FIR No. 103 of 2020 dated 9.9.2020, under Sections 363, 366 and 376 of IPC and Section 6 of POCSO Act, registered at P.S. Nirmand, District Kullu, H.P.

2. Record/status filed by the respondent-State in terms of order dated 3.11.2020, reveals that on 9.9.2020, complainant namely Ganesh Dutt, lodged a complaint at PS Nirmand, District Kullu, H.P., alleging therein that his minor daughter victim-prosecutrix (named withheld) has gone missing. Complainant disclosed to the police that at 7:30 pm, some villagers from his village informed him that his daughter has gone somewhere without informing anybody. Complainant stated to the police that he has made best efforts to locate his minor daughter in near relations, but she is not traceable and as such, appropriate action may be taken to trace her. On 10.9.2020, victim-prosecutrix came to be apprehended with the bail petitioner near village Joa. Police after recording the statement of victim-prosecutrix under

Section 161 Cr.PC., lodged FIR detailed herein above, against the bail petitioner under Sections 363, and 376 of the IPC and Section 6 of the POCSO Act and since then, he is behind bars.

3. Victim-prosecutrix in her statement recorded before the JMIC, Anni, District Kullu under Section 164 Cr.PC, stated that she of her own volition and without there being external pressure had gone with the bail petitioner and they both wanted to solemnize marriage. Record reveals that though initially, victim-prosecutrix refused to undergo medical test, but subsequently, she was medically examined by the medical officer, CH Nirmand, District Kullu. Medical Officer, who after having examined victim-prosecutrix at CH Nirmand opined as under *"After examining the victim, my opinion about there are neither genital or physical injuries present suggestive of no use of force however sexual assault cannot be ruled out. But final opinion reserved till receipt of sample report from RFSL*". Subsequently, aforesaid medical officer on the basis of RFSL report No. 1506 opined as under *"(1) Semen and blood were not detected in exhibit-1a (pubic hair), exhibit 1b (vaginal swabs), exhibits 1d (vulval swab), exhibit 1e (shirt), exhibit 1f (Salwar), exhibit 1y (vest) and exhibits 1h (underwear) of victim (8) human semen was detected in exhibits 1C (vaginal slides) but blood was not detected on it. So I am of the opinion that she was undergone sexual intercourse*." After completion of the investigation, challan stands filed in the competent court of law but till date, charge has not been framed.

4. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while fairly acknowledging 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 the bail petitioner, his application for grant of bail deserves to be rejected outrightly. Mr. Bhatnagar, submits that though there is overwhelming evidence adduced on record by the Investigating Agency suggestive of the fact that bail petitioner taking undue advantage of innocence of the victim-prosecutrix not only kidnapped her, but sexually assaulted her against her wishes, but even otherwise, consent, if any, of victim-prosecutrix, who is minor, is irrelevant and as such, prayer made on behalf of the petitioner for grant of bail deserves outright rejection, who in the event of being enlarged on bail, may not only flee from justice, rather may create undue pressure upon the victim-prosecutrix, to not to depose against him in the competent court of law and as such, it would not be in the interest of justice to enlarge him on bail at this stage.

5. Having heard learned counsel for the parties and perused material available on record, especially statement of victim-prosecutrix recorded under Section 164 Cr.PC before the learned JMIC Anni, this Court finds that victim-prosecutrix and bail petitioner were known to each other for quite considerable time and they had been meeting each other frequently. Victim-prosecutrix in her aforesaid statement recorded under Section 164 Cr.PC has

categorically stated that she frequently used to talk to the bail petitioner on the mobile and for doing so, she was also given beatings by her father. It also emerges from the statement of victim-prosecutrix recorded under Section 164 Cr.PC that she of her own volition and without there being any external pressure joined the company of the bail petitioner. Though as per investigating agency, victim-prosecutrix was subjected to forcible sexual intercourse by the bail petitioner, but medical evidence adduced on record does not support the case of the prosecution. Medical Officer after having examined victim-prosecutrix at CH Nirmand, categorically opined that there are no genital or physical injuries and there appears to be no use of force. However, in his final opinion, on the basis of RFSL report, he opined that semen and blood were not detected, but he is of the opinion that victim-prosecutrix had undergone sexual intercourse. Medical opinion rendered by the medical expert is silent about the duration and time. No doubt, in the case at hand, victim-prosecutrix was 16.5 years old at the time of the alleged incident, but after having seen her conduct, which clearly reflects from her statement recorded under Section 164 Cr.PC, this Court is unable to agree with learned Additional Advocate General that victim-prosecutrix was incapable of understanding the consequences of her being in the company of the bail petitioner, rather this court finds from the record that victim-prosecutrix had prior acquaintance with the bail petitioner and they both wanted to solemnize marriage. Even on the alleged date of incident, victim-prosecutrix with her own volition went with the bail petitioner.

6. 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 coupled with the fact that challan stands filed in the competent court of law and nothing remains to be recovered from the bail petitioner, there appears to be no justification to let the bail petitioner incarcerate in jail for an indefinite period during trial. Hon'ble Apex Court as well as this Court in catena of cases have repeatedly held that one is deemed to be innocent till the time, guilt of his/her is not proved in accordance with law. In the case at hand, guilt if any of the bail petitioner is yet to be established on record by the Investigating Agency by leading cogent and convincing evidence and as such, his freedom cannot be curtailed for an indefinite period during trial. Moreover, trial of the accused is likely to be further delayed on account of COVID-19 and as such, this Court sees no justification to keep the petitioner in jail for an indefinite period during trial. Apprehension expressed by the learned Additional Advocate General that in the event of petitioner's being enlarged on bail, he may flee from justice, can be best met by putting the bail petitioner to stringent conditions as has been fairly stated by the learned counsel for the petitioner.

7. 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.***
>
> ***4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not***

> ***absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.***
>
> ***5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.***

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

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

> ***" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that***

some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

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

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

prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

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

(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.

12. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, petitioner has carved out a case for grant of bail, accordingly, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to his furnishing personal bond in the sum of Rs. 1,00,000/- 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.

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

P.L. Sharma .....Petitioner

Versus

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

CWP No.1358 of 2020
Reserved on: 22nd December, 2020Decided on: 28th December, 2020

It is not open for the court to have its own appraisal and to independently interpret the terms of the tender document by substituting the appraisal and Interpretation of the expert committee more so when such interpretation has not been shown to be incorrect.

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;
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;
Raunaq International Ltd. vs. I.V.R. Construction Ltd. (1999) 1 SCC 492=1999 (1) Arb. LR 431 (SC);
Raunaq International Ltd. v. IVR Construction Ltd, (1999) 1 SCC 492;
Maa Binda Express Carrier v. NorthEast Frontier Railway, (2014) 3 SCC 760;
Shobikaa Impex (P) Ltd. V. Central Medical Services Society, (2016) 16 SCC 233;
Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd., 2016 (16) SCC 818;
Bharat Coking Coal Ltd. v. AMR Dev Prabha 2020 SCC OnLine SC 335;
Silppi Constructions Contractors v. Union of India, 2019 SCC OnLine SC 1133;

For the Petitioner: Mr. Ajay Sharma, Senior Advocate with Mr. Amit Jamwal, Advocate.

For the Respondents: Mr. Ashok Sharma, Advocate General

with Mr. Shiv Pal Manhans & Mr. VikasRathore, Additional Advocates Generaland Mr. Bhupinder Thakur, Ms. SeemaSharma & Mr. Yudhvir Singh Thakur,Deputy Advocates General, for respondents No.1 to 4-State.
Mr. Neeraj Maniktala, Advocate, forrespondent No.5.
(Through Video Conference)

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

Out of two participating bidders, technical bid ofthe petitioner was turned down as non-responsive and that of private respondent No.5 was held to be conforming to the Standard Bid Document. Financial bid of respondent No.5 was opened on 19.03.2020. Feeling aggrieved, petitioner has moved the instant writ petition.

2. Respondent No.3 through an e-Procurement notice dated 17.01.2020, invited tenders for *"Up-gradation of Dhelu to Bhatehar road Km. 0/0 to 13/400 (L-029) under Regular PMGSY II for the year 2019-20 (Package No.HP-08- 428) (Sub Head:- ROFD, C/o retaining walls, breast walls, Crate walls, construction of missing cross drainage work, Providing and laying GSB, metalling and tarring, Cement concrete pavement road side drain, road side parapets, W-Metal Beam crash barriers, PMGSY information board, sign boards kilometre stones, 200 mtr. RD stones etc. including five year routine maintenance)"*. Online bids could be submitted by 26.02.2020. The project was sanctioned by the Ministry of Rural Development, Government of India, under the Pradhan Mantri Gram Sadak Yojna ('PMGSY' inshort), Rural Road Project-II and is financed by the World Bank.

Petitioner and respondent No.5 participated and submitted their bids, which were opened on 26.02.2020.

The technical evaluation of the bids was carried out by the Technical Committee on 04.03.2020. Technical bid submitted by the petitioner was found to be not conforming to Clause 4.4 A(b) of 'Instructions To Bidders' (in short 'ITB') as contained in Standard Bid Document (in short 'SBD') and thus was rejected as non-responsive. Technical bid of respondent No.5 was found to be responsive. His financial bid was also opened on 19.03.2020.

Further procedure was not completed in view of the status quo order passed on20.03.2020 in the instant writ petition.

3. The arguments raised by learned Senior Counsel for the petitioner can be broadly considered under following main points:-

3(i). *With respect to petitioner's eligibility*: Petitioner's bid was compliant of provisions of SBD and ITB and thus could not be rejected by terming it as non-responsive.

3(ii). *With respect to eligibility of respondent No.5*: Bid submitted by respondent No.5 could not be accepted andought to have been declared as non-responsive.

3(iii). *Procedure to be followed in case of single bid*: Without prejudice to above two arguments, after declaration of petitioner's bid as non-responsive, the financial bid of respondent No.5 could not be opened contrary to the guidelines owing to respondent No.5 being single bidder. Therefore, respondents should have invited fresh tenders.

4(i). We have heard Mr. Ajay Sharma, learned Senior Counsel for the petitioner, Mr. Ashok Sharma, learnedAdvocate General and Mr. Neeraj Maniktala, learned counsel for respondent No.5 on the factual and legal aspects of the above points.

4(ii). Eligibility of the petitioner:-

4(ii)(a). Clause 4.4A of ITB as contained in SBD, around which the submissions of the parties revolve under this head, is extracted hereinafter:-

> "4.4 A To qualify for award of the Contract, each bidder should havein the last five years (5 years immediate preceding the year, in which the bids are invited, year means financial year);
>
> (a) *Achieved in any one year a minimum financial turnover as mentioned in the Bid Data Sheet (as certified by Chartered Accountant, and at least 50% of which is from Civil Engineering construction works). The estimated cost of the work would not include maintenance cost for 5 years and the turnover will be indexed at the rate of 8% per year.*
>
> (b) *satisfactorily completed, as prime contractor or sub contractor, at least one similar work equal in value half of the estimated cost of work (excluding maintenance cost for five years) for which the bid is invited."*

To become eligible for award of contract in terms of Clause 4.4A(a), a bidder must have achieved in any one year of immediately preceding last five years a minimum financial turnover as mentioned in the Bid Data Sheet. The financial turnover must have been certified by the Chartered Accountant and at least 50% of the same must have accrued from Civil Engineering construction works. The estimated cost of the work was not to include maintenance cost for five years. The turnover was to be indexed at the rate of 8% per year. The minimum financial turnover under Clause 4.4A(a) as enumerated in Bid Data Sheet was Rs.1141.83 lakhs. It is not in dispute that petitioner's bid was compliant of this provision as financial turnover of the petitioner after indexing it at the rate of 8% per year was above than the minimum financial turnover of Rs.1141.83 lakhs laid out in the Bid Data Sheet.

4(ii)(b). In terms of Clause 4.4A(b), the bidder in immediate preceding last five years should have satisfactorily completed either as prime contractor or sub- contractor at least one similar work equal in value half of the estimated cost of the work (excluding maintenance cost for five years) for which the bid was invited. The Bid Data Sheet quantified the required value of satisfactorily completed one similar work at Rs.570.91 lakhs. The completion certificate of similar work done by the petitioner valued the work at Rs.499.84 lakhs, which is less than the requirement as per SBD ITB clause.

4(ii)(c). From reading of Clause 4.4A of ITB as contained in SBD, it is evident that the said clause is in two parts. First part, i.e. 4.4A(a) pertains to required minimum financial turnover of Rs.1141.83 lakhs and 4.4A(b) pertains to satisfactory completion of one similar work by the bidder valuing Rs.570.91 lakhs. The financial turnover and value of similar work is to be determined as per provisions of respective sub-clauses. Petitioner's bid complied Clause 4.4A(a) as he had minimum financial turnover as prescribed in the Bid Data Sheet. However, the qualifying work done certificate appended by him at Annexure P-2 and as detailed by the respondents in their reply, reflects that the gross amount of work completed by him in terms of Clause 4.4A(b) was valuing Rs.499.84 lakhs as against the required value of Rs.570.91 lakhs. The value of the similar work

done by the petitioner did not meet the requirement of Clause 4.4A(b). It is for this reason that his bid was rejected being non-responsive.

4(ii)(d). Learned Senior Counsel for the petitioner contended that 8% per year indexing applied for calculating financial turnover under Clause 4.4A(a) should have also been applied for calculating the amount of similar work done under Clause 4.4A(b). Learned Senior Counsel further urged that the terms 'work done' and 'financial turnover' cannot be separated from each other. Once 8% per year indexing provision is there for calculating the financial turnover of the bidder, then the amount of similar work done is also to be arrived at only by applying 8% per year indexing clause and in case the same is used for arriving at the amount of work done by the petitioner, then the figure of his bid under Clause 4.4A(b) would be much more than required Rs.570.91 lakhs. In such eventuality, his bid could not be declared as non-responsive.

We are afraid the argument has no legs to stand upon. Clause 4.4A as extracted above is unequivocal with very clear language admitting no ambiguity. It is only the financial turnover, which in terms of Clause 4.4A(a) is to be indexed at the rate of 8% per year. Value of the similar work done under Clause 4.4A(b) is not to be arrived at by indexing the same at the rate of 8% per year. There is no such provision in Clause 4.4A(b) of SBD. The pleadings of petition also reveal that the petitioner was aware of the difference between two sub-clauses of Clause 4.4A and understanding this difference, he participated in the bidding process. It was only on 04.03.2020, when the bids were being technically evaluated that he submitted his representation in this regard. His representation was considered on 06.03.2020. Meeting of the Technical Evaluation Committee for looking into and redressing the grievance represented by the petitioner was held with latter's representative. He was apprised of the fact that escalation formula can be used only for calculating the financial turnover and not for arriving at the current price level of the work done in the past. The Technical Evaluation Committee explained to the representative of the petitioner that he had executed one similar work in the last five years amounting to Rs.499.84 lakhs as against the required value of Rs.570.91 lakhs. Therefore, having executed the work valuing less than required as per ITB clause of SBD, his bid was rejected being non-responsive. Petitioner also registered a

complaint against determination of non- responsiveness of his bid. This complaint was considered on 16.03.2020 by a duly constituted committee and objection of petitioner was turned down.

4(ii)(e). While dealing with somewhat similar issue, this Court in ***CWP No.2734 of 2020***, decided on 9th October, 2020, titled ***Tek Singh Raghav Versus State of Himachal Pradesh and others***, has held that when tender conditions are specific and unambiguous, then it is not lawful to bring ambiguity into the same by reading certain clause from elsewhere to determine the eligibility of participating bidders when the other clauses were not incorporated in the tender document. Relevant para of the judgment is extracted hereinafter:-

> "5. Observations:-
>
> Admittedly, it is not the case of the petitioner that any condition of 7% indexing was actually incorporated in the NIeT in question. In fact, the petitioner wants to read this condition in the tender document by falling back upon CPWD Manual (Annexure P-3) and asserts that the respondents were bound to bodily lift all the conditions contained in the CPWD Manual including the condition of 7% indexing and to incorporate them in the NIeT in question. The precise argument raised by learned counsel for the petitioner is that irrespective of incorporation of this condition in the NIeT, the calculation of the cost of previous similar works done by the bidder has to be assessed at 7% enhancement per annum to ascertain their current value.
>
> The fact remains that the NIeT does not contain any such condition of 7% indexing. All the bidders including the petitioner have participated under the specific terms & conditions of the tender document.
>
> The tender document in question was issued for the second time for the same work. Even when it was issued for the first time, no such condition of 7% indexing was there. None of the bidders voiced any grievance about non-inclusion of 7% indexing clause in the NIeT. Similarly, second time also when the NIeT in question was issued, there was no such clause pertaining to 7% enhancement of the cost of the similar works executed in past. Petitioner as per his admission had never sought any clarification from the respondents with respect to non-inclusion of 7% enhancement clause in the NIeT. After participating under the specific terms & conditions of the tender document, it is not permissible for him to challenge the rejection of his

technical bid on the ground that his eligibility was to be determined under a particular clause, which in reality is not part of the tender document. We are not examining the question as to whether 7% indexing clause of CPWD manual was required to be part of the tender document or not. The stage to raise that question has gone for the petitioner. Therefore, even assuming that the respondents were bound to invite tenders as per the CPWD Manual, the fact remains that the tender document was issued in consonance with memorandum dated 10.01.2020 issued by the State Government, which did not provide for calculating cost of similar works carried out in past at 7% indexing rate. The acceptance of contentions of the petitioner would also mean prejudicing various such contractors, who might be interested to bid for the work in question, but might not have submitted their bids because of the eligibility criteria expressly provided in Clause 2(ix) of the NIeT without knowing 7% indexing clause in the CPWD manual.

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."

This Court in ***CWP No.3583 of 2020****, titled* ***M/s Chamunda Construction Company Versus State of Himachal Pradesh and others****, decided on 28.09.2020, has held as under vide paras 12 to 14:-*

"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."

In ***Civil Appeal No.2197 of 2020****, titled* ***Bharat Coking Coal Ltd. & Ors. Versus AMR Dev Prabha & Ors.****, decided on 18th March, 2020, the Hon'ble Supreme Court, while considering the legal position settled in* ***Raunaq International*** Ltd. v. IVR Construction Ltd, (1999) 1 SCC 492; Maa Binda Express Carrier v. NorthEast Frontier Railway, (2014) 3 SCC 760 and Shobikaa Impex (P) Ltd. V. Central Medical Services Society, (2016) 16 SCC 233, observed as under:-

"39. Additionally, we are not impressed with the first respondent's argument that there is a certain public interest at stake whenever the public exchequer is involved. There are various factors in play, in addition to mere bidding price, like technical ability and timely completion which must be kept in mind. And adopting such interpretation would permanently blur the line between contractual disputes involving the State and those affecting public law. This has aptly been highlighted in Raunaq International Ltd. v. IVR Construction Ltd. [(1999) 1 SCC 492]

"11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would

ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers." (emphasis supplied)

40. *Further, the first respondent has failed to demonstrate which public law right it was claiming. The main thrust of AMR Dev Prabha's case has been on the fact that at 1:03PM on 05.05.2015 it was declared the lowest bidder (or L1). However, being declared the L1 bidder does not bestow upon any entity a public law entitlement to award of the contract, as noted in Maa Binda Express Carrier v. North-East Frontier Railway [(2014) 3 SCC 760]:*

"8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and nondiscriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided

such relaxation is permissible under the terms governing the tender process." (emphasis supplied)

47. *With regard to other allegations concerning condonation of Respondent No. 6's delay in producing guarantees, we would only reiterate that there is no prohibition in law against public authorities granting relaxations for bona fide reasons. In Shobikaa Impex (P) Ltd. v. Central Medical Services Society [(2016) 16 SCC 233], it has been noted that:*

"… the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It has been further held that 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 powers 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."

48. *Even if there had been a minor deviation from explicit terms of the NIT, it would not be sufficient by itself in the absence of mala fide for courts to set aside the tender at the behest of an unsuccessful bidder. This is* because notice must be kept of the impact of overturning an executive decision and its impact on the larger public interest in the form of cost overruns or delays."

When tender conditions are specific and unambiguous, it is not lawful to bring ambiguity into the same by reading certain clauses from a manual to determine the eligibility of the participating bidders when these clauses were not incorporated in the tender document. Non-incorporation of conditions of the manual in the NIeT were not questioned by the petitioner. Having participated under the express terms of the tender document and after failing therein, it is not permissible for the petitioner to contend that his eligibility was required to be determined as per conditions contained in the manual. We do not find any infirmity in the action of respondents No.1 to 4 in rejecting the Technical Bid of the petitioner."

For the above reasons, the contention of learned Senior Counsel for the petitioner that 8% per year indexing clause incorporated in projects

under PMGSY-I should beconstrued to have been automatically incorporated in thetender in question, which is part of PMGSY-II, cannot be countenanced. The tendered project is not under PMGSY-I works, but is part of PMGSY-II. The tender conditions of PMGSY Part-II for the work in question are specific, admitting of no ambiguity. Financial turnover under Clause 4.4A(a) and work done under Clause 4.4A(b) have been differently treated under the main clause 4.4A of SBD ITB. Indexing of amount by 8% per year available under Clause 4.4A(a) to arrive at financial turnover of bidder is not available for determining the value of similar work done by the bidder. Having participated in the bidding process with clear understanding of the terms, the provisions, theirimplications and after remaining unsuccessful therein, the petitioner cannot be heard to complain about alleged deletion of some words in the SBD and also cannot be allowed to read some words in the tender clauses, which are not there at all. This illegal and unlawful approach will also cause prejudice even to those who did not submit bids in view of plain conditions of SBD. Accordingly, the first contention raised by learned Senior Counsel for the petitioner has no force and is rejected.

4(iii). Eligibility of Respondent No.5:-

4(iii)(a). The second limb of argument advanced by learned Senior Counsel for the petitioner harps on the eligibility of respondent No.5. It is contended that respondent No.5 is ineligible for the tendered project as no 'similar work' falling within the ambit of Clause 4.4A(b) of SBD ITB of the value mentioned in the clause had been executed by him. It is also urged that respondent No.5 had not executed civil construction and bitumen works in the apposite ratio. Therefore, financial turnover of respondent No.5 considered by the official respondent as compliant of Clause 4.4A(a) in reality was non-compliant as value of bitumen works could not be considered in arriving at his financial turnover. The contention has been strongly refuted by learned counsel for the respondents bysubmitting that certificate dated 10.04.2017 (Annexure P- 9), showing execution of similar work executed by respondent No.5 in the permissible period for an amount of Rs.613.50 lakhs, had been appended. The amount of work done as per the certificate is above the prescribed limit of Rs.570.91 lakhs and satisfies the criteria laid in Clause 4.4A(b). The petitioner had raised grievance before the

Technical Evaluation Committee that the work carried out by respondent No.5 did not fall within the parameters of'similar work' under Clause 4.4A(b) of SBD ITB and mostly pertained to bituminous work. The complaint of the petitioner was examined by a committee constituted on 06.04.2019 for scrutiny of complaints/representations at the stage of evaluation of Part-I of bids, viz. technical qualification for the work in question. The Bill of Quantities (BOQ) submitted by respondent No.5 were examined by the committee. The committee observed following in respect of bid of the petitioner and disputed nature of work donecertificate of respondent No.5:-

> "2. Under ITB Clause 4.4A(b):-
> Point No.1:- As per this clause to qualify for award of the contract, each bidder should have in the last five years (5 years immediately preceding the year, in which the bids are invited, year means financial year); (b) satisfactorily completed, as prime contractor or sub-contractor, at least one similar work equal in value to half of the estimated cost of work (Excluding maintenance cost for five years) for which the bid is invited or such higher amount as may be specified in the Appendix to ITB. In present case last five year period is 2014- 15 to 2018-19. Half of the estimated cost of the work under ITB clause 4.4A(b) comes out to be Rs.570.91 lacs, but during Bid Evaluation report for works-Part I, the amount mentioned against Sh. P.L. Sharma under clause 4.4A(b) is Rs.499.94 lacs as per technical evaluation summary which is less than
> 570.91 lakh. Sh. P.L. Sharma, in his complaint has requested for enhancement on the work done of Rs.499.94 lacs @ 8% per year. But Clause 4.4A stated that the enhancement @ 7% per year is allowed only for turn over purpose. As such objection raised by Sh. P.L. Sharma is not valid and the Bid is rightly technically evaluated as non-responsive.
> Point No.2:- Sh. P.L. Sharma, Head Office Bir, Distt. Kangra (HP) has registered complaint against determination of responsiveness of bid of Sh. G.P. Acharya, Govt. Contractor by Circle level Technical Evaluation committee under ITB Clause 4.4A(b) and has stated that the bid of Sh. G.P. Acharya does not satisfy the criteria of similar nature work done.
>
> The matter was referred to Executive Engineer, NH Division, HPPWD, Jogindernagar to verify the work done alongwith bill of quantity and copy of final bill against the above work done through Executive Engineer,

> Jogindernagar Division. The report has been submitted by Executive Engineer, NH, Division to Executive Engineer, Jogindernagar, HPPWD, Jogindernagar vide letter No.13226 dated 16.3.2020 received through e-mail. The committee has scrutinized the work done certificate for the work Periodical Renewal from k.131/0 to 141/0 of NH-20 (New NH-154) uploaded by the bidder Sh. G.P. Acharya, Govt. Contractor and it has been found by the committee that the items are similar in nature."

The committee was of the considered opinion that "Bid of complainant/bidder Sh. P.L. Sharma does not satisfy the qualification criteria as per Clause 4.4.A(b) of SBD & has been declared non-responsive and the bid of Sh. G.P. Acharya declared as responsive by technical evaluation committee of circle level in fair manner. Hence the representation of the complainant/bidder Sh. P.L. Sharma, Govt. Contractor is rejected and stands disposed of. The technical-Financial Part II of the bid will be opened on 19.3.2020." Same reason will hold good in respect of responsiveness of the bid of respondent No.5 under Clause 4.4A(a) as well.

4(iii)(b). Hon'ble Apex Court in catena of precedents has held that the authority authoring the tender document is the best person to understand and appreciate its requirement. Therefore, the interpretation of terms of tender document should not be second guessed by a Court in judicial review proceedings. Due deference has to be given to authority's interpretation. The authority which floats the contract and has authored tender document is the best judge as to how the documents have to be interpreted. Even if two interpretations are possible, then also the interpretation as given by the author must be accepted. Relevant extracts from a recent judgment dated December 18, 2020, passed by the Hon'ble Apex Court in ***SLP(Civil) No.12766 of 2020***, titled ***M/S Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers Versus M/S New J.K. Roadways, Fleet Owners and Transport Contractors & Ors.***, are as under:-

> *"14. In a series of judgments, this Court has held that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in*

judicial review proceedings. In ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd., 2016 (16) SCC 818****, this Court held:*

> "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."
>
> (page 825)
> (emphasis supplied)

15. *In the judgment in* ***Bharat Coking Coal Ltd. v. AMR Dev Prabha 2020 SCC OnLine SC 335****, under the heading "Deference to authority's interpretation", this Court stated:*

> "51. Lastly, we deem it necessary to deal with another fundamental problem. It is obvious that Respondent No. 1 seeks to only enforce terms of the NIT. Inherent in such exercise is interpretation of contractual terms. However, it must be noted that judicial interpretation of contracts in the sphere of commerce stands on a distinct footing than while interpreting statutes.
>
> *52. In the present facts, it is clear that BCCL and India have laid recourse to Clauses of the NIT, whether it be to justify condonation of delay of Respondent No. 6 in submitting performance bank guarantees or their decision to resume auction on grounds of technical failure. BCCL having authored these documents, is better placed to* appreciate their requirements and interpret them. (Afcons Infrastructure Ltd v. Nagpur Metro Rail Corporation Ltd, (2016) 16 SCC 818 at para 15)
>
> *53. The High Court ought to have deferred to this understanding, unless it was patently perverse or mala fide. Given how BCCL's interpretation of these clauses was plausible and not absurd, solely differences in opinion of contractual interpretation ought not to have been grounds for the High Court to come to a finding that the appellant committed illegality."*
>
> (emphasis supplied)

16. *Further, in the recent judgment in* ***Silppi Constructions Contractors v. Union of India, 2019 SCC OnLine SC 1133****, this Court held as follows:*

> "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." (emphasis supplied)"

Applying the above settled legal principles to the facts of the case and keeping in mind the decision of the Expert Committee constituted by the respondents, it can be safely concluded that it is not open for this Court to have its own appraisal and to independently interpret the terms of the tender document by substituting the appraisal and interpretation of the expert committee, more so when such interpretation has not been shown to be incorrect orunlawful. Hence, there is no merit in the second contentionof the petitioner and the same is accordingly rejected.

4(iv). Single Bid Scenario:-

Last contention raised by learned Senior Counsel for the petitioner is that after rejection of petitioner's bid, respondent No.5 remained the sole bidderin the foray. His being single bidder, Clause 5.8 of May, 2013 Guidelines for Evaluation of Bids and Award of Contract under Pradhan Mantri Gram Sadak Yojana (PMGSY), circulated vide letter dated 07.05.2013, gets attracted, which bar awarding the tender to single bidder. Therefore, it is urged that instead of opening financial bid of single

bidder/respondent No.5, the official respondents should have resorted to calling fresh tenders. Following clause has been pressed into service in support of the above submission:-

> "5.8. Single Bids/Tenders: In order to promote full transparency, healthy competition and award of works at the most reasonable price, it is not desirable to have too many awards of works on Single Bid/Tender basis. Accordingly, in case of receipt of Single Bid/Tender in the first invitation of Bids, the following process shall be adopted:-
>
> a) *Definition of Single Tender: If, consequent to invitation of tenders/bids for any package, only one bid/tender is received or consequent to technical evaluation if only one bid/tender is found substantially responsive, such bids/tender shall be termed as single tender for the purposes of the PMGSY. Opening of Single Bids/Tenders: If in the first invitation/ call, single tender/bid is received, the State Rural Roads Development Agency (SRRDA) or authority inviting the tenders/bids shall not open the bid. In such cases, the bids shall be re-invited. Modifications in the e-procurement software shall be made by the NIC to delete the bid (while maintaining the meta-data in the database) from the server after the date of opening of bids and generate appropriate reports in this regard.*
>
> b) *Second and Subsequent Invitation of Bids/Tenders: Before issuing the second or subsequent invitations of bids, the SRRDAs are free to re-package the works or revise the estimated cost based on current market rates though no cost escalation would be borne by Government of India in such cases (In case of repackaging, the invitation of bids would be treated as fresh invitation/call). The State would be able to accept Single Tender in second or subsequent invitations/calls keeping in view the Guidelines of CVC in this regard and the fact that the rates are reasonable and full justification is recorded. Such bids shall be accepted with the approval of a Committee headed by CEO of SRRDA and comprising CE/E-in- C and Financial Controller as members (as per Para 5.7 above)."*

However, reading of next clause, i.e. 5.9 of the same guidelines, shows that Clause 5.8 is not applicable to the World Bank assisted Projects. Clause 5.9 reads as under:-

> "5.9 PMGSY works financed by ADB/World Bank: In case of Asian Development Bank/World Bank Assisted Projects, the relevant procurement guidelines shall apply and provisions of Para 5.8 above shall not be applicable."

It is not in dispute that present is a World Bank funded project. Therefore, Clause 5.8 is clearly notattracted. The Procurement & Contract Management Manual for PMGSY RRP-II have also been placed on recordas Annexure R-5/B. It has not been pointed out to us that there is any bar in the relevant procurement guidelines prohibiting acceptance of single bid for PMGSY RRP-II projects, rather Clause 4.7.4 thereof gives an indication that single bid could also be accepted in the factual situation of the tender process. Clause 4.7.4 reads as under:-

> "4.7.4 After taking care of the above factors, if the quoted price of the lowest evaluated responsive bid is considered unreasonably high, following procedure should be followed while taking a decision for inviting a rebid.
>
> (i) *Irrespective of number of bids received for a package, the contract shall be awarded to the lowest evaluated responsive bidder who meets the eligibility and qualification requirements and the prices are considered reasonable compared to market values. In case the price of such bidder is substantially higher than the cost estimate duly updated on the basis of current market prices of inputs, then the SRRDA shall seek clarifications from the bidder and if the explanation of the bidder is found justified, the contract shall be awarded.*
>
> (ii) *In case the Evaluation Committee is not satisfied with the clarification provided by the bidder, and bid prices are considered unreasonably high, then the rebidding may be resorted to.*
>
> (iii) *In case of no bids, reasons for the same should be investigated. In case it is considered that for reasons of no bids, or otherwise for reasons brought out in (ii) above, rebidding is considered inescapable, the scope of work, specifications etc. should be reviewed and suitable changes should be considered in the bid package including slicing the contract package so as to ensure competitive bids in response to re-bidding. No rebidding should be undertaken with the same parameters. Exception could be small packages or just one small work where slicing may not be practicable.*
>
> (iv) *The principles enunciated above shall also apply to the bids received in the second round of bidding."*

Factual assertion on behalf of the respondentsthat acting on the same guidelines, the petitioner, even though being a single bidder, was

awarded the work for "Up-gradation of Ahju to Suja Road', has not been deniedby the petitioner. Be that as it may.

The third contention of the petitioner also lacks merit and is accordingly dismissed.

5. For the foregoing discussion under three different heads, we find no merit in the instant writ petition and the same is accordingly dismissed alongwith pendingmiscellaneous application(s), if any.

We have been apprised that in case the tendered work in question, which is of public importance and being funded by the World Bank, is not awarded by 31.12.2020, then in terms of instructions issued on 10.12.2020 by the Ministry of Rural Development, Government of India, the same will be frozen. In view of dismissal of the writ petition, the respondents are permitted to proceed ahead to completethe tender proceedings.

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

Ashok Kumar ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 2193 of 2020
Date of Decision: 29th December, 2020

Code of Criminal Procedure, 1973:-Section 439- A child aged 15 years alleging rape by as many as seven young males including the petitioner- Not a case for bail- Evidence being referred by ld. counsel is not annexed with petition. Petitioner can file fresh bail petition placing on record the evidence.

For the petitioner: Mr. Karan Singh Kanwar, Advocate.

For the respondent: Mr. Suresh Chand Sharma, Senior Additional Advocate General with Mr. Nand Lal Thakur, Additional Advocate General.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

The following judgment of the Court was delivered:

Anoop Chitkara, Judge (oral).

The petitioner, who is aged 25 years and arraigned as an accused for committing rape upon a minor girl aged 15 years and is now under incarceration, has come up before this Court seeking regular bail.

2. I have gone through the status report and heard learned counsel for the parties.

3. The status report reveals the age of the victim as 15 years. The investigation also reveals that seven boys on various occasions committed sexual intercourse with her. The petitioner is one of those persons. It is not a case, where the minor girl out of romantic love had consented to have coitus with her boyfriend and voluntarily slept with him.

4. Mr. Karan Singh Kanwar, learned counsel for the petitioner states that he wants to draw attention of this Court to certain evidence.

5. A perusal of the petition reveals that no such evidence is annexed with it. Therefore, in case the petitioner wants to refer to any evidence, then he may annex the same and cannot argue it in the present bail petition.

6. On merits, given the allegations levelled by a child aged 15 years alleging rape by as many as seven young males including the petitioner is not a case for bail. However, it shall be open for the petitioner to file a fresh bail petition placing on record the evidence, which he may refer to make out a case for bail.

The petition is disposed of in the aforesaid terms.

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

Raj Kumar @ Sethi ...Petitioner

Versus

State of HP ....Respondent

Cr.MP(M) No. 2030 of 2020
Date of Decision 18th Dec, 2020

Narcotic Drugs and Psychotropic Substances 1985;-Section 21, 22, 29 ND&PS Act- during search petitioner skipped from house- 1500 capsules of Tharmdol recovered from kitchen- Petitioner absconded- Petitioner has criminal history – Similar cases under ND&PS Act- Sister of petitioner Overpowered at his residence throwing chaff containing 6.12 gm heroin- Custodial interrogation necessary- Not fit case to extend the benefits of section 438 of Cr.PC.

For the Petitioner: Ms. Sheetal Vyas, Advocate, through Video Conferencing.

For the Respondent: Mr.Raju Ram Rahi, Deputy Advocate General, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

This petition has been preferred for enlarging the petitioner on bail in case FIR No. 128 of 2020 dated 3.9.2020 registered in Police Station Damtal, District Kangra HP, under Sections 21, 22 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act')

2 Status report stands filed, wherein it is stated that on the basis of reliable information, house of petitioner was searched and during that search, petitioner had skipped from the back door of house and had run away. Despite efforts, he could not be chased. During search, 1500 capsules of Tramadol were recovered from the container of rice kept in kitchen of house of petitioner and since then, petitioner was absconding and had approached this Court on 13.11.2020 on which date, interim bail was granted to him. Thereafter, petitioner has joined the investigation on 15th November, 2020, however, his custodial interrogation has been prayed to interrogate him in the matter to elucidate further information.

3. It is also stated in status report that earlier also, case FIR No. 249 of 2003, dated 29.11.2003 under Sections 452, 324, 323 and 342 IPC; FIR No. 18 of 2017 dated 5.1.2017 under Section 21 of NDPS Act ; and FIR No. 213 of 2017 dated 6.7.2017 under Section 21 of NDPS Act were registered in Police Station Nurpur and a case FIR No. 125 of 2019 dated 4.10.2019 under Section 21 of NDPS Act was registered in Police Station Damtal against the petitioner/accused. In this year also, in the month of July, 2020, FIR No. 93 of 2020 under Sections 21 and 29 of NDPS Act has been registered against petitioner in Police Station Damtal wherein 36.62 grams heroine was allegedly recovered from him.

4. It is also stated that one Kiran, claiming her to be sister of petitioner, was also overpowered in the residence of the petitioner, who, on seeing police, had thrown a chaff wherein 6.12 gram heroin was recovered. The said Kiran has been arrested and she is in judicial custody.

5. Considering the entire facts and circumstances of the case and prayer of Investigating Agency, I find that it is not a fit case to extend the benefit of Section 438 Cr.P.C. to the petitioner, rather, his custodial interrogation, as has been prayed, would be necessary. Therefore, present petition is dismissed. Needless to say that interim protection granted on 13th November, 2020 also stands revoked. Petitioner is directed to surrender in concerned Police Station latest by tomorrow i.e. 19th December, 2020.

6. Petition stands disposed of. Any observation made in this order shall not affect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 438 of Code of Criminal Procedure 1973.

BEFORE HON'BLE MS. JYOTSNA REWAL DUA, J.

Sushma Devi .....Petitioner.

Versus

State of Himachal Pradesh & ors. .....Respondents.

CWP No. 1556 of 2014
Decided on: 22.12.2020

Constitution of India, 1950 - Article 226- Writ petition- Petitioner, after having successfully contested the case against original appointee – Instead of respondent No 5,She deserves to be appointed in place of original appointee- Petitioner neither participated in the inquiry proceedings nor did petitioner challenges these proceeding before the Competent Authority- It is not for the court to don the role of fact finding authority in exercise of its extra ordinary jurisdiction under act 226 of the constitution of India- The writ petition of petitioner was decided and Matter was remanded- On remand, the appellate authority directed the competent authority to hold inquiry with respect to the income certificate of respondent No.5 being disputed by petitioner -once the petitioner does not participate in the inquiry proceedings conducted by the fact finding authority and does not even challenge these proceeding then subsequently she can not be heard to complain about income certificate of respondent No.5.

Cases referred:

Sunita Singh versus State of Uttar Pradesh & others, reported in (2018) 2 SCC 493.
CWP No. 1096/2010, titled Raksha Devi versus State of H.P. & others

For the petitioner : Mr. B.C. Verma, Advocate.
For the respondents : Mr. Anil Jaswal, Addl. AG, for respondents No. 1 to 4.

Ms. Megha Kapur Gautam, Advocate,for respondent No. 5.
Nemo for respondent No. 6.

(THROUGH VIDEO CONFERENCE)

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, *Judge* (Oral)

Petitioner despite being successful in dislodging respondent No. 6 from the post of Anganwari Worker could not procure appointment in her favour. After her successful challenge to the appointment of respondent No. 6, the resultant vacancy has been filled-in from the second in the merit i.e. respondent No. 5. Aggrieved, the petitioner has preferred instant writ petition with the grievance that she was the torch bearer and, therefore, after having successfully contested the case against the original appointee/respondent No. 6, instead of respondent No. 5 it is the petitioner who deserved to be appointed in place of respondent No. 6.

2(i) Selection process was conducted in 2007 for the post of Angnwari Worker in Anganwari Centre Togi wherein petitioner alongwith others participated. The selection committee headed by the Sub Divisional Officer (Civil), Anni selected and appointed respondent No. 6 as an Anganwari Worker. Petitioner challenged the selection and appointment of respondent No. 6, inter-alia on the ground that annual family income of respondent No. 6 was beyond the prescribed ceiling limit. The appellate authority i.e. Deputy Commissioner, Kullu vide order dated 10.1.2008 allowed petitioner's appeal and set aside the selection and appointment of respondent No. 6 after conforming that annual family income of respondent No. 6 was beyond the prescribed income limit. The Deputy Commissioner also ordered to offer the appointment to respondent No. 5 being first in the waiting list. Respondent No. 5 was accordingly appointed and is working as such w.e.f. 3.3.2008.

2(ii) The petitioner as well as respondent No. 6 challenged the order dated 10.1.2008 passed by the Deputy Commissioner before the learned Divisional Commissioner, Mandi/respondent No. 2 by filing two separate appeals. Petitioner in her appeal contended that income of respondent No. 5 was also beyond the prescribed limit, therefore, she despite being next in the merit, could not be appointed as an Anganwari Worker. Whereas respondent No. 6 in her appeal challenged cancellation of her appointment. Both these appeals were dismissed by respondent No. 2 vide order dated 23.6.2008. Not satisfied, petitioner instituted CWP No. 1548 of 2008 before this Court, which was decided on 3.6.2010. The matter was remanded to the appellate authority for afresh decision. Paragraph-6 of the judgment, being relevant, is extracted hereinafter:

> *"6. There will be a direction to the appellate authority in these cases, to take appropriate steps in the cases where a dispute on income is involved, to get the same duly processed by the competent authority, in the matter of cancellation. Necessary steps in that regard will be taken and action finalized within a period of four months from the date of production of this judgment to the competent authority. That competent authority will also afford an opportunity to the affected party to participate in that proceedings. Subject to the outcome of the action thus taken by the competent authority, on the income certificate already issued to the incumbent, the appellate authority will take appropriate action within two months. We also make it clear that in the event of any appointment being cancelled, the appellate authority will also issue necessary directions for the next person from the list, to be appointed, in case a list is available. Needless to say that until the process, as above said, is completed, the incumbents now working,*

will be continued. We may make it clear that the inquiry will be on the basis of the Policy/Guidelines as existed at the time of appointment."

2(iii) After remand, the appellant authority on 29.11.2010 directed the competent authority to ascertain the correctness of income certificates of the parties. The competent authority conducted the proceedings for ascertaining the income certificate of respondent No. 5 being disputed by the petitioner. Despite being directed to remain present in the proceedings, the petitioner did not associate herself in the proceedings. At the conclusion of the proceedings, the income certificate dated 15.5.2007 issued in favour of respondent No. 5 was held to be correctly issued. Accordingly, appeal filed by the petitioner before the learned appellate authority was dismissed on 22.6.2011 reserving liberty to her to challenge the correctness of the income certificate before the competent authority. Further appeal preferred by the petitioner against the order dated 22.6.2011 was also turned down by the Divisional Commissioner/respondent No. 2 on 3.12.2013.

3. Aggrieved, instant writ petition has been preferred by her claiming following reliefs:

"*(i)* *That the respondent No. 1 to 4 may be ordered to produce entire record of the case.*

(ii) *That the order Annexure P-2 and Annexure P-3 as passed by the Respondent No. 2 and 3 may be ordered to be set aside and quashed and consequently this Hon'ble Court may be pleased to pass order for selection and appointment of the petitioner as Anganwari Worker in Anganwari Centre, Togi, Tehsil Ani, District Kullu, H.P."*

4. I have heard learned counsel for the parties and gone through the pleadings and record appended therewith.

4(i) Learned Counsel for the petitioner urged that annual family income of respondent No. 5 was more than the prescribed limit, therefore, she was ineligible for appointment as an Anganwari Worker.

A perusal of the inquiry proceedings conducted by the respondents, enclosed at Annexure P-4, reveal that the petitioner was directed by the concerned authority to present her case for challenging the income certificate issued in favour of respondent No. 5. The petitioner however did not attend these proceedings and chose to remain absent. Inquiry was conducted by the concerned authority on the basis of statements of the parties present and record produced by the officials. It was concluded that the income certificate in favour of respondent

No. 5 was justly issued in accordance with the factual position. As observed above, neither the petitioner participated in the inquiry proceedings nor did she challenge these proceedings before the competent authority. It is not for this Court to don the role of fact finding authority in exercise of its extra ordinary jurisdiction under Article 226 of the Constitution of India. The writ petition CWP No. 1548/2008 preferred by the petitioner was decided on 23.6.2010 and matter was remanded. On remand, the appellate authority directed the competent authority to hold inquiry with respect to the income certificate of respondent No. 5 being disputed by the petitioner. Once the petitioner does not participate in the inquiry proceedings conducted by the fact finding authority and does not even challenge these proceedings then subsequently she cannot be heard to complain about income certificate of respondent No. 5.

4(ii) Another argument raised on behalf of the petitioner is that respondent No. 5 was not entitled to marks given to her for belonging to Schedule Tribes by birth since she had married a person belonging to general category. This argument cannot be countenanced as such benefit is available on the basis of birth mark. It will be apposite to refer to the judgment rendered by Hon'ble Apex Court in ***Sunita Singh*** versus ***State of Uttar Pradesh & others***, reported in ***(2018) 2 SCC 493.*** Para-5 of the judgment is extracted hereinbelow:

> *"5. There cannot be any dispute that the caste is determined by birth and the caste cannot be changed by marriage with a person of scheduled caste. Undoubtedly, the appellant was born in "Agarwal" family, which falls in general category and not in scheduled caste. Merely because her husband is belonging to a scheduled caste category, the appellant should not have been issued with a caste certificate showing her caste as scheduled caste. In that regard, the orders of the authorities as well as the judgment of the High Court cannot be faulted."*

4(iii) It has also been contended for the petitioner that the cut off date for separate of family had to be taken as 1.1.2004 and therefore, respondent No. 5 who alongwith her husband had separated from their family w.e.f. 16.4.2007, was not eligible to claim the benefit of separate family.

A division Bench of this Court in *CWP No. 1096/2010*, titled **Raksha Devi** versus ***State of H.P. & others,*** decided on 17th May, 2010 has considered the issue of separation of families and has held that separation of family as on 1.1.2004 is not a pre-requisite condition to make a person eligible for appointment. Separation of family is mentioned in Clause 4(e) of the scheme for appointment of Anganwari Worker for the purpose of computation of income. Relevant paras from the judgment are extracted hereinafter:

"7. Coming to the other cases, issues involved pertain to eligibility conditions other than income. In some cases issue raised is as to the computation of income, based on the family status. Family status is to be decided, based on the cut off date, namely 1.1.2004. The Parivar Register is the basic and conclusive evidence with regard to the family status. Therefore, computation of income should be on the basis of the members of the family, entered in the Parivar Register, as on 1.1.2004 and not on any other certificate. We find that in some of the cases, for the only reason that the family had not been separated as on 1.1.2004, the candidates were disqualified. The separation of the family as on 1.1.2004, is not a pre requisite condition to make a person eligible for appointment. The eligibility criterion, as appearing in the Guidelines, at 4(e) reads as follows:

> *"Those belonging to a family which was legally separated as a separate family as per procedure laid down in the Panchayati Raj Act and Rules before 1st January, 2004"*

Clause 4(f) also has to be read, in conjunction with clause (e), which reads:

> *"Those whose annual income does not exceed Rs.8000 per annum, to be certified / countersigned by an officer not below the rank of Tehsildar."*

8. Separation of the family is specifically mentioned in clause 4(e), only for the purpose of computation of income, and if not it will certainly be a patently unreasonable provision for making a person eligible to apply for the post of Anganwadi Workers/Helpers. Income is the criterion and that was sought to be explained as per clause 4(e). Otherwise, for the only reason that the family is not separate even if the income is far below Rs.12,000/-, an applicant would not be entitled to make an application. That certainly is not the object of the prescription of the criterion, as extracted above."

As already observed, income certificate of respondent No. 5 dated 15.5.2007 reflecting her annual family income to be within the prescribed limit has been held to be valid by the fact finding authority.

4(iv) It is also contended that it was the petitioner and not respondent No. 5 who had challenged the appointment of respondent No. 6 as Anganwari Worker. Therefore, after cancellation of respondent No. 6's appointment as a consequence of a litigation pursued by the

petitioner, it is only the petitioner who ought to have been appointed as Anganwari Worker. Appointment of respondent No. 5 as Anganwari Worker is contrary to law.

Assertion of the petitioner that she deserved to be appointed as Anganwari Worker instead of respondent No. 5 as it was the petitioner who successfully pursued the litigation seeking cancellation of appointment of respondent No. 6, is untenable. It is not in dispute that respondent No. 5 was next in merit being first in the waiting list. Therefore, in the facts and circumstances of the case it was only just and proper on part of official respondents to have offered the post to respondent No. 5, who was also a respondent in the appeal preferred by the petitioner on 29.9.2010 (Annexure P-1) and had participated in the inquiry proceedings conducted by the fact finding authority in 2011 and in subsequent proceedings thereafter. Petitioner though carried the torch, but cannot be appointed ignoring the merit of respondent No. 5, who pursuant to her appointment on 3.3.2008 as an Anganwari Worker is continuing working as such. Petitioner is also statedly working as Asha Worker w.e.f. 2016.

5. No other point has been urged.

Considering all above aspects, there being no merit in the instant writ petition, the same is, therefore, dismissed, so also the pending application(s), if any.

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

Navender Kumar ....Petitioner.

Versus

The H.P. State Forest Corporation & another ... Respondents.

CWPOA No.6770 of 2019
Reserved on: 04.11.2020
Decided on: 02.12.2020

Constitution of India, 1950:- Article 226-It is settled law that though right to promotion is not a fundamental right, but right to be considered for promotion is a fundamental right. - the petitioner was duly considered by the Departmental Promotional Committee for promotion and the tone and tenor of the reply of the respondent-department is that the petitioner was also recommended for promotion. In such like scenario, in case, the recommendations of the DPC are not implemented and in the interregnum, an employee retires, then benefit of the recommendations of the DPC has to be given to such like employee, though may be notionally. This is for the reason that after DPC recommends promotions, then issuance of the order of promotion, not being in the hand of employee, can not act to his deterrent in case he stands superannuated in the meanwhile. The date of superannuation of an employee is well within the knowledge of the employer and therefore, onus falls fairly squarely on the employer to ensure that promotion orders of such like employee who stands recommended for promotion, but is to superannuate in near future are issued without any undue delay.

For the petitioner : Mr. A.K. Gupta, Advocate.

For the respondents : Mr.Jyotirmay Bhatt, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

The petitioner before this Court filed an original application before learned erstwhile Himachal Pradesh Administrative Tribunal, i.e. O.A.(M) No.610 of 2016, titled as Navender Kumar Versus The H.P. State Forest Corporation & another, praying for the following reliefs:-

> "a. That Annexure P-1 may be quashed and set aside and the respondents may be ordered to promote the applicant as Deputy Ranger from the due date with all the benefits incidental thereof since the said promotion will effect his pension and other service benefits particularly status of the applicant would be upgraded".

After the abolition of learned Tribunal, the Original Application stood transferred to this Court.

2. Brief facts necessary for the adjudication of this petition are that the petitioner superannuated from the service of the Himachal Pradesh Forest Corporation as a Forest Guard. He retired as such on 31.03.2015. The case of the petitioner is that before his superannuation, he was entitled for promotion to the post of Deputy Ranger in the year 2015, however, the promotion was not given, since the Departmental Promotional Committee did not take place and in the meanwhile, he superannuated. According to him he made a representation in this regard to the respondents, which has been dismissed vide Annexure P-1, on the ground that he stood retired from the services, which stand of the respondents was not sustainable in the eyes of law because as the petitioner was denied promotion, as no Departmental Promotional Committee took place in time, therefore, even after his superannuation, he was entitled to the status and wages of the post to which he deserved to be promoted. It is in this background, petitioner has approached the Court, praying for the reliefs already enumerated hereinabove.

3. The reply which has been filed to the petition, *inter alia*, demonstrates that though a Departmental Promotional Committee was convened for considering the case of eligible candidates for promotion to the post of Deputy Ranger, however, the petitioner could not be promoted to the post of Deputy Ranger as he had superannuated before the recommendations of the Departmental Promotional Committee could be given effect too. It is on this ground that the respondents have justified issuance of Annexure P-1, vide which the representation of the petitioner stood rejected, because according to them, prayer of the petitioner to give him benefit of sixteen days extension in service for the purpose of promotion was not sustainable, as said benefit was given to those persons only by the department, who were stagnated on a particular post and could not be promoted due to the non-availability of the vacancy.

4. Having heard learned counsel for the parties and having gone through the pleadings, in my considered view, this petition has to be allowed.

5. Suffice to say that the pleadings in the petition are cryptic. Yet, as the petitioner is entitled for the relief in view of the admissions made by the respondents in their reply, this Court cannot shun away from its duty of imparting justice by dismissing the petition, on the ground that the same is drafted cryptically by omitting necessary facts, which would have had facilitated this Court in deciding the case.

6. It is not in dispute that the petitioner was eligible for promotion to the post of Deputy Ranger when he superannuated on 31.03.2015. Though the case of the petitioner as is pleaded in this petition is that promotion to the post of Deputy Ranger stood denied to him as no Departmental Promotional Committee was convened by the department, however, the reply filed by respondent-department demonstrates that a Departmental Promotional Committee was duly convened, in which the case of the petitioner was also considered for promotion, however, the petitioner could not be promoted to the post of Deputy Ranger, as he stood superannuated before the process of promotion was completed.

7. To be more precise, para 6 (i) of the reply filed by the respondent-corporation is quoted hereinbelow:-

> "That the contents of this para admitted to the extent that the applicant was working as Forest Guard in Forest Working Division, Kullu in the year 2015. The process for promotion of Forest Guard was in progress. Although, D.P.C. at the level of Director (North) was held on 18.-03-2015, but compilation of result and scrutiny of result received from other Directors/ General Managers at Head Office level was completed on 25-04-2015, whereas, the applicant has retired on 31.03.2015. Thus, the claim of promotion is not genuine."

8. In my considered view, once the Departmental Promotional Committee stood convened for considering the case of the petitioner for promotion to the post of Deputy Ranger, then the benefit of said recommendation of the Departmental Promotional Committee cannot be denied to the petitioner, simply on the ground that he stood superannuated before the recommendations of the Departmental Promotional Committee could be implemented. The onus to implement the recommendations of the Departmental Promotional Committee was upon the department concerned and for the acts of omission of the department, the petitioner cannot be made to suffer.

9. It is settled law that though right to promotion is not a fundamental right, but right to be considered for promotion is a fundamental right. In this case, the petitioner was duly considered by the Departmental Promotional Committee for promotion and the tone and tenor of the reply of the respondent-department is that the petitioner was also recommended for promotion. In such like scenario, in case, the recommendations of the Departmental Promotional

Committee are not implemented and in the interregnum, an employee retires, then benefit of the recommendations of the Departmental Promotional Committee has to be given to such like employee, though may be notionally. This is for the reason that after Departmental Promotional Committee recommends promotions, then issuance of the order of promotion, not being in the hand of employee, cannot act to his deterrent in case he stands superannuated in the meanwhile. The date of superannuation of an employee is well within the knowledge of the employer and therefore, onus falls fairly squarely on the employer to ensure that promotion orders of such like employee who stands recommended for promotion, but is to superannuate in near future are issued without any undue delay.

10. Accordingly, this writ petition is allowed by quashing Annexure P-1 and by ordering that the benefit of the recommendations of the Departmental Promotional Committee be given to the petitioner, though on notional basis, by deeming him to have been promoted to the post of Deputy Ranger one day prior to the date of his superannuation. From the said date, as upto the date when the Original application was filed before learned Tribunal, i.e. 03.03.2016, notional benefits of promotion shall be given to the petitioner and thereafter, actual benefits as accrue to the petitioner, shall be conferred upon him including monetary benefits. In case the monetary benefits as are due to the petitioner as a result of this judgment, are paid to him within 90 days from today, then no interest shall be payable upon the same, but in case the same are not paid within 90 days as from today, then the same shall entail 6% simple interest as from the date of filing of the Original Application. Petition stands disposed of in above terms, so also pending miscellaneous applications, if any.

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

Smt. Rekha Kumari Sharma ....Petitioner.

Versus

The Principal Secretary (Industries) to the Government of Himachal Pradesh and others ...Respondents.

CWPOA No. 267 of 2019
Decided on: 22.09.2020

Constitution of India, 1950- Article 226-Petition-For setting aside the appointment of respondent No.4 as instructor in cutting and tailoring on the ground respondent No.4 who was much less qualified or less proficient than petitioner in trade was selected- Held- It is not case of petitioner that respondent No.4 was not qualified to be considered for appointment against post of instructor- Simply petitioner feels that she was more qualified than the selected candidate, same does not confer upon her any right to pray for setting aside of the appointment

of selected candidate- Selection of a qualified candidate can not be set at naught by the court unless and until the court is satisfied that the appointment was not on merit but due to some extraneous reasons – Selection committee which was best judge in the cause- and decision of committee has to be respected in the absence of there being any material on record to substantiate that selection was not on merit but on extraneous consideration.

For the petitioner : Mr. Lalit Kumar Sehgal, Advocate, vice Mr. M.C. Sharma, Advocate.

For the respondents : Mr. Sumesh Raj, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocate Generals, for respondents No.1 to 3.

Respondent No.4 is *ex parte*.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

By way of this petition, petitioner has prayed for setting aside the appointment of respondent No.4, as Instructor in Cutting and Tailoring, I.T.I. (Women), Bilaspur, District Bilaspur, H.P.

2. The case of the petitioner is that after passing her matriculation examination, she joined the course in Cutting and Tailoring, run by Rural Development Department at Bharari Development Block, District Hamirpur. She passed the same in the year 1987. Thereafter, she joined the Industrial Training Institute for Women at Hamirpur and passed the I.T.I. course in Cutting and Tailoring in the year 1988. Thereafter, she continued her training and joined Cutting and Tailoring Course in the Central Crafts Institute for Women at Chandigarh as well as Industrial Training Institute at Sundernagar, from where she did the course of Embroidery and Needle Work. She also undertook the advance course of Dress Making from the National Council for Advance Training in the year 1994. As per her, an advertisement was issued by the Principal of Industrial Training Institute, Bilaspur, in Divya Himachal, dated 09.08.2006, inviting applications from eligible candidates for being appointed against the post of Instructor to be engaged on self-financed basis in the Industrial Training Institute for Women at Bilaspur. Petitioner appeared in the interview for the post in issue on 24.08.2006. Her grievance is that respondent No.4 who was much less qualified than the petitioner and less proficient than her in the trade, was selected against the post in issue, ignoring the more meritorious candidate, i.e. the petitioner. It is on these basis that this petition has been filed by the petitioner, praying for setting aside of the appointment of respondent No.4.

3. Reply to the petition has been filed by respondents No.1 to 3, in which it has been mentioned that the candidates who had responded to the advertisement were interviewed on 24.08.2006 and though the petitioner was fulfilling essential qualification, but her resume

alongwith application for the post in issue were not found as per the requirement. As per said respondents, petitioner had produced two experience certificates issued on the same letter heads of the Kangra Welfare Society under same dispatch and diary number as well as the date with different nature to draw the benefit of experience, yet she was given due credit of her experience. Respondent No.4 was found academic and technically more qualified than the petitioner in terms of requirements of the institute and therefore, she was offered the appointment. Thus, prayer has been made by the said respondents for dismissal of the petition.

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

5. Petitioner has sought setting aside of the appointment of the private respondent as an Instructor, which appointment was made in the year 2006. Though, it is the contention of the petitioner that she was more meritorious than the selected candidates, however, respondents No.1 to 3 have clarified in the response filed by them that it was respondent No.4 who was found to be better suited for the job in issue on the basis of her academic and technical qualifications.

6. In my considered view, when it is not the case of the petitioner that respondent No.4 was not qualified to be considered for appointment against the post of Instructor, then simply because the petitioner feels that she was more qualified than the selected candidate, the same does not confers upon the petitioner any right to pray for setting aside of the appointment of selected candidate. This, I say for the reason that selection of a qualified candidate cannot be set at naught by the Court, until and unless the Court is satisfied that the appointment was not on merit, but due to some extraneous reasons.

7. In this case, no malafides have been alleged against the Selection Committee that selection of respondent No.4 was for extraneous reasons and was not on merit. That being the case, this Court cannot at this stage enter into the subjective analysis of adjudging as to who was the better candidate, because in my considered view, it was the Selection Committee which was the best Judge in the cause and the decision of the said Committee has to be respected in the absence of there being any material on record to substantiate that selection of respondent No.4 was not on merit, but on extraneous considerations.

8. Thus, as this Court does not finds any merit in this petition, the same is dismissed. Pending miscellaneous applications, if any, also stand disposed of.

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

CWPOA No.66 of 2019

Ranu Ram ....Petitioner.

Versus

Himachal Pradesh State

Electricity Board Ltd. & others ...Respondents.

COPCT No.586 of 2020

Ranu Ram ....Petitioner.

Versus

Baldev Chand & another ...Respondents.

CWPOA No.66 of 2019 a/w
COPCT No.586 of 2020
Decided on: 24.09.2020

Constitution of India, 1950- Article 226-Petition:- Seeking release of salary- of period when he was shifted and relieved but did not join duty, however, subsequently his transfer order was cancelled- In view of section 47 of the persons with disabilities (Equal opportunities) protection of rights and full participation Act- Held above provision was not applicable- As his grievance was not that the job which was being assigned to him Either of lineman or Assistant line man was not of nature which he could not perform with the kind of disability he was suffering -he was not happy with his transfer - he has not placed anything on record to demonstrate that on account of disability he was not in a position to serve at Moraj- Case being of willful absence from duty no work- No pay principle is attracted.

For the petitioner : Mr. Prem P. Chauhan, Advocate in both the petitions.

For the respondent(s) : Ms. Ruma Kaushik, Advocate, in both the petitions. .

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

CWPOA No.66 of 2019

Case of the petitioner is that he was serving with the respondent-Board as Assistant Lineman, when vide Annexure A-1, dated 26.05.2015, he was ordered to be temporarily shifted from Electrical Section, Himachal Pradesh State Electricity Board (HPSEB), Ltd. Tharoch, under Electrical Sub-Division HPSEBL Nerwa to Electrical Section HPSEB Ltd. Marog, under Electrical Sub-Division HPSEB Ltd. Chopal, for fifteen days with immediate effect. Petitioner could not join the place of transfer as he was suffering from 40% permanent disability which he had acquired in harness, on account of which he was not in a position to serve at the place of transfer and he had a right to be posted at a place preferably near to his native place. It is a matter of record that vide Annexure A-3, dated 22.01.2016, the petitioner was ordered to be adjusted at Electrical Sub-Division, Nerwa, under Electrical Sub-Division Chopal, against a vacant post with immediate effect. In compliance thereto, the petitioner joined his duties on 28.01.2016. Thereafter, vide Annexure A-5, the petitioner was again readjusted at Electrical Section, HPSEBL, Tharoch.

2. The grievance of the petitioner is with regard to non-payment of salary to him as between the period when he stood transferred vide Annexure A-1 and till the time he was adjusted vide Annexure A-3. The contention of the petitioner is that in view of the provisions of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, i.e. the Act in force at the relevant time, the petitioner could not be denied the wages for the period when he could not join the station to which he was transferred, as Section 47 of the above Act fully protected him. On these counts, the petitioner has prayed that respondents be directed to release salary him for the months of May 2015, June 2015, September 2015 to January 2016 and also a part of March 2016.

3. The petition has been resisted by the respondents, *inter alia*, on the ground that vide Office Order dated 26.05.2015 (Annexure A-1), the petitioner was ordered to be shifted to Chopal for fifteen days. The petitioner was relieved from HPSEB Section, Nerwa, on 28.05.2015, but he disobeyed the orders and did not join there. Petitioner remained willfully absent from 28.05.2015 upto 30.06.2015. Thereafter, the transfer of the applicant (petitioner) was cancelled vide order dated 04.07.2015. Petitioner otherwise is in a habit of disobeying the orders of his superiors as many complaints stood filed against him from time to time. Vide order dated 27.08.2015, the petitioner on promotion to the post of Lineman, was posted at Electrical Section, Marog and he was relieved from duties with the direction to join the new place of posting vide order dated 01.09.2015. However, he did not join his duty at Marog and remained willfully absent. Thereafter, he was adjusted at Electrical Sub-Division Nerwa, under Electrical Sub-Division, Chopal, against a vacant post vide letter dated 22.01.2016. Petitioner was paid the salary w.e.f. 21.01.2016 to 29.02.2016. Thereafter, he again remained willfully absent from duty w.e.f. 14.03.2016 for a period of sixteen days in the month of March and, thus, he was not entitled for grant of wages, which he is claiming by way of this petition.

4. I have heard learned Counsel for the parties and have gone through the pleadings as well as record appended therewith.

5. In my considered view, in the peculiar facts of this case, the provisions of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 do not come to rescue of the petitioner. Section 47 of the 1995 Act (supra) reads as under:-

> "Non-discrimination in Government Employments- (1) No establishment shall dispense with, or reduce in rank, an employee who acquired a disability during his service:
>
> Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability:

Provided that the appropriate Government, may having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section".

6. Here the grievance of the petitioner was not that the job which was being assigned to him either of an Assistant Lineman or a Lineman was not of a nature which he could not perform with the kind of disability he was suffering from. Apparently, the petitioner was not happy with his transfer to Marog, when he was transferred to the said station earlier as an Assistant Lineman and thereafter, on promotion as a Lineman, therefore, he did not join there. He has not placed anything on record to demonstrate that on account of his disability, he was not in a position to serve at Marog.

7. That being the case, this proves the contention of the respondent-Board that the petitioner remained willfully absent from duties. As such, in my considered view, the principle of 'No Work No Pay', but natural, is attracted and petitioner cannot claim wages for the period when he did not perform his duties on being transferred to Marog earlier as an Assistant Lineman and later on as a Lineman and remained absent from duty. Similarly, even for the month of March, when he remained willfully absent for a period of sixteen days, he could not claim any wages.

8. In these circumstances, this writ petition is disposed of with the direction that though the petitioner cannot be granted any salary for the period claimed by him as he remained willfully absent from duty during the period in issue, but he shall be at liberty to have this period converted into leave of the kind due to him.

9. At this stage, learned Counsel for the petitioner informs the Court that though the petitioner has superannuated in the 2017, however, his pensionary emoluments have not been paid to him till date. It is observed that if pendency of this petition was the only impediment in the non-payment of pension to the petitioner, then needful be positively done within a period of thirty days from today. Petition is closed in above terms, so also pending miscellaneous application, if any. Interim order, if any, also stands vacated.

COPCT No.586 of 2020

10. As this Court does not finds any willful disobedience of any order passed by the Court, these contempt proceedings are accordingly dropped. Notice stands discharged.

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

Man Dass ....Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

CWP No. 1684 of 2020
Decided on: 25.09.2020

Constitution of India, 1950-Article 226-Writ Petition- challenging the order dated 30.05.2020 relieving petitioner on attaining age of superannuation in view of order dated 25.3.2020 of Government under H P epidemic Disease (Covid-19) Regulations 2020 deferring and extending the age of superannuation of all Medical officers retiring on 31.3.2020, 30.4.2020 and 31.5.2020 up to 30.6.2020- Held- When state in its wisdom had defered the age of superannuation of all para medical staff up to 30.6.2020 then up to 31.8.2020. It was not open to state to discriminate and adopt the policy of pick and chooses while giving extension to paraz medical staff.

For the petitioner : Mr. Jagat Paul, Advocate.

For the respondents : Mr. Sumesh Raj, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocate Generals.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

The controversy involved in this writ petition is in a very narrow compass. Additional Chief Secretary, Health to the Government of Himachal Pradesh issued an order dated 25.03.2020 (Annexure P-1) in exercise of powers vested in him under Clause-3 of the Himachal Pradesh Epidemic Disease (Covid-19) (Amendment) Regulations, 2020, to the effect that superannuation of all Medical Officers, Faculty Members and Para Medical Staff of all categories working under the Government of Himachal Pradesh in the Department of Health and Family Welfare and Medical Education & Research, who are due to retire on 31.03.2020, 30.04.2020 and 31.05.2020, shall be deemed to be deferred and extended upto 30.06.2020.

2. Petitioner, who was serving as Opthalmic Officer at CH Tegubehar, Block Jari, District Kullu and who was to superannuate on 31.05.2020, on attaining the age of superannuation, was relieved of his duties by the Block Medical Officer Jari, District Kullu, on 30.05.2020, vide Annexure P-2.

3. Feeling aggrieved, petitioner has filed this petition with the prayer that relieving of the petitioner is illegal and in violation of order dated 25.03.2020, issued by respondent No.1 more so when persons similarly situated as the petitioner were given the benefit of the said order.

4. The stand of the State is that though order dated 25.03.2020 was issued which was followed by another orders dated 29.06.2020 and 29.08.2020, however, vide order dated 29.08.2020 (Annexure R-3) appended with the reply of the respondents, certain categories for the purpose of extension in service in view of COVID-19 Pandemic were included for the purpose of said extension and all categories were not included and the excluded categories also included the category of Opthalmic Officer. On these basis, contention of the State is that the petitioner is not entitled for any relief.

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

6. As, I have already mentioned above, vide order dated 25.03.2020, the date of superannuation of Medical Officers as well as Para Medical Staff, who were to superannuate on 31.03.2020, 30.04.2020 and 31.05.2020, was deemed to be deferred and extended upto 30.06.2020. Thereafter, vide order dated 29.06.2020, which is appended with the reply filed by the respondents as Annexure R-2, the date of superannuation of Medical Officers as well as Para Medical Staff of all categories working under the Government of Himachal Pradesh in the Department of Health and Family Welfare and Medical Education & Research, who were to retire on 31.03.2020, 30.04.2020 and 31.05.2020, was extended and deferred upto 31.08.2020. This was followed by order dated 29.08.2020 (Annexure R-3), vide which the date of superannuation of the Para Medical Staff of the categories mentioned therein, which admittedly does not includes the category of Ophthalmic Officer, was deferred and extended utpo 31.10.2020.

7. Thus, it is evident from the three orders which were issued from time to time by the Government that vide earlier two orders whereas the date of superannuation of all Medical Officers and all Para Medical Staff were extended upto 30.06.2020 and then 31.08.2020, thereafter vide Annexure R-3, the date of superannuation of the Para Medical Staff categorically mentioned in order dated 29.08.2020, was extended upto 31.10.2020.

8. In these circumstances, when the date of superannuation of Para Medical Staff was deferred by the State Government expressly earlier upto 30.06.2020 and then after 31.08.2020, the act of the respondents of relieving the petitioner from duties on attaining the age of superannuation on 31.05.2020, is arbitrary and in violation of orders dated 25.03.2020 as well as 29.06.2020.

9. This, I say so for the reason that when respondent No.1 in its wisdom, had deferred the age of superannuation of all Para Medical Staff, firstly upto 30.06.2020 and then upto 31.08.2020, then it was not open to the respondents to discriminate and adopt the policy of pick and choose while giving extension to Para Medical Staff. This observation is being made because it is the categorical stand of learned Counsel for the petitioner before this Court that petitioner was

discriminated vis-a-vis similarly situated persons whose services were continued post the date of superannuation in terms of the orders issued by the State.

10. Accordingly, this petition is allowed by quashing order dated 30.05.2020 (Annexure P-2), vide which petitioner was relieved, with issuance of a mandamus to the respondents that the petitioner shall be deemed to have continued in service and superannuated as such on 31.08.2020, with all consequential benefits, however, with one caveat that the petitioner shall be entitled to the benefit of this judgment only if benefit of order dated 29.03.2020 as well as 29.06.2020 was given to even one of the Para Medical Staff in the State. Petition is disposed of in above terms. Pending miscellaneous applications, if any, also stand disposed of.

BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Rahul Malik ....Petitioner

Versus

State of Himachal Pradesh ...Respondent

Cr.MP(M) No. 1670 of 2020
Reserved on: 27.10.2020
Decided on: 30.10.2020

Cr.P.C-Section 439-under section 302,307,147,148,149 I P C and sections 25 and 29 Arms Act The accused has a right to maintain successive bail petitions under changed circumstances- the change in circumstances must be substantial having direct and consequential impact on the previous decision, whereby the bail was denied, the changes in the circumstances must not be trivial or cosmetic having no significance of little or no consequence- It is also well settled that without substantial change in the circumstances, subsequent bail petition would be merely review sought to the earlier petition, which was dismissed and such review is not permissible under the Law- it is the duty of the court to consider all the reasons and grounds whereupon the earlier bail petition was rejected and what are the fresh grounds worth consideration ultimately warranting evaluation of fresh bail petition and leading the court to take a divergent view from that of the earlier view rejecting the petition- There must be change in fact ,situation or in law compelling the court to take different view.

For the petitioner: Mr. N.S. Chandel, Sr. Advocate, with
Mr. Vinod Gupta, Advocate.

For the respondent/State: M/s. S.C. Sharma and Mr. P.K. Bhatti,
Additional Advocates General.

ASI Ramesh Chand, P.S. Dharampur, District Solan, H.P.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. .

The present bail application has been maintained by the petitioner under Section 439 of the Code of Criminal Procedure seeking his release in case FIR No. 68 of 2016, dated 27.06.2016, under Section 302, 307, 147, 148, 149 IPC and Sections 25 & 29 of the Arms Act, registered at Police Station Dharampur, District Solan, H.P.

2. On 26.06.2016, in a horrendous incident of gunshot, allegedly fired by the petitioner herein, one Shri Param Jeet Singh (deceased), lost his life. Tersely, the facts, as emanates from the records are that on 26.06.2016 Smt. Taran Jeet Kaur (complainant) got her statement recorded under Section 154 Cr.P.C. As per the complainant, she alongwith her husband, Shri Param Jeet Singh used to run a restaurant (*dhaba*) at Sanawara and the said *dhaba* was being looked after by her, her husband and nephew Hasandeep (injured). On 26.06.2016, when she was washing clothes, around 05:00 p.m., a tourist group of 10/15 persons came in the *dhaba* and they were being attended upon by Naresh Kumar (attendant). Subsequently, a dispute arose qua the freshness of the meals and scuffle ensued. One of the persons from the tourist group went to the vehicle, brought a pistol and fired at her husband (Shri Param Jeet Singh). Shri Hasandeep was also hit with gun shot on his chest. Thereafter, all the persons fled away from the spot in their vehicle, having registration number of Uttar Pradesh. The deceased and Shri Hasandeep were rushed to the CHC, Dharampur. The deceased was declared dead and Shri Hasandeep was referred to PGI, Chandigarh. On the basis of the statement of the complainant, police registered a case and the investigation ensued. Postmortem examination on the corpse of the deceased was conducted. Police prepared the spot map and clicked photographs of the spot. CCTV footage was obtained and police recovered empty cartridges, sword like weapon, having blood, pieces of carton etc. During the course of investigation, it was unearthed that the petitioner alongwith other accused persons fled away from the spot in a vehicle, having registration No. UP14FT-3871. The petitioner was arrested on 27.06.2016 and he was medically examined. Police collected the scientific evidence for analysis. Other accused persons were also arrested. Scientific samples collected from the spot were chemically examined in Forensic Science Laboratory, Junga. CCTV footage was also examined, which shows the presence of the petitioner and other accused persons on the spot. During the course of investigation, it was unearthed that the petitioner alongwith other accused persons were on tour to Dharamshala and Shimla and while returning they stopped in the *dhaba* of the deceased. The petitioner and other accused persons were not satisfied with the quality of the food, so a quarrel started and the petitioner fired at the deceased. As per the prosecution, *challan* stands presented in the Court and now the prosecution witnesses are being examined. Lastly, it is prayed that the bail application of the petitioner be dismissed, as, it was the petitioner, who opened fire at the deceased and injured. The petitioner was proactively involved

in commission of the crime and he killed the deceased and caused life-threatening injuries to the injured. The petitioner alongwith other co-accused was involved in a heinous offence and in case he is enlarged on bail, he may tamper with the prosecution evidence and may also flee from justice. The prosecution opposed the petition on the ground that there exists *prima facie* case against the petitioner and other accused persons and there is reasonable ground that the petitioner, alongwith other accused persons, committed the murder of the deceased, the offence of which the petitioner is accused of is heinous and there is possibility that the petitioner, in case enlarged on bail, may abscond. Simultaneously, the prosecution is objecting the bail application on the basis that in case the petitioner is enlarged on bail, he may try to influence the witnesses and there is possible danger of justice being thwarted by granting bail to the petitioner.

3. I have heard the learned Senior Counsel for the petitioner, learned Additional Advocate General for the State, learned Counsel for the complainant and gone through the record, including the police reports, carefully.

4. Before proceeding further, it would be imperative to note that earlier the petitioner approached this Court, by filing two petitions i.e., Cr.MP(M) No. 1508 of 2018 and Cr.MP(M) No. 1364 of 2019, one after another, seeking his bail. Cr.MP(M) No. 1364 of 2019 was ultimately dismissed and by this Court and in Cr.MP(M) No. 1508 of 2018, a Co-ordinate Bench of this Court granted bail to the petitioner for a fixed period, i.e., w.e.f. 11.12.2018 to 02.01.2019, permitting him to appear in examination. Relevant para of the judgment, rendered by Co-ordinate Bench of this Court in Cr.MP(M) No. 1508 of 2018, for ready reference, is extracted hereunder:

> *6. Considering the entire facts and circumstances of the case and also previous orders passed rejecting his bail, granting permission to appear in examination and on the basis of other material on record, I am of the considered opinion that he is not entitled for regular bail, but bail only for limited period, enabling him to appear in the examination. Accordingly, petitioner is ordered to be released on bail for limited period i.e. w.e.f. 11th December, 2018 till 2nd January, 2019, subject to furnishing of personal bonds in the sum of ₹1,00,000/- with two sureties in the like amount, one of which must be from the State of Himachal Pradesh, to the satisfaction of learned trial Court, also depositing his Pass Port in original in Trial Court and subject to further following conditions:-*
>
> *(i) That the petitioner shall surrender before Superintendent Jail on 2nd January, 2019 befo9re 3:00 P.M.:*

(ii) *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;*

(iii) *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 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;*

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

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

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

(vii) *that the petitioner shall not jump over the bail;*

(viii) *he shall not leave the territory of India without prior permission of the Court;*

(ix) *if petitioner is having Passport, he shall deposit the original Passport in the trial Court at the time of furnishing bail bonds;*

(x) *he shall keep informing change of his address, during bail period;*

(xi) *Petitioner shall also inform about mobile number, if any and landline phone number for contact by police making himself available to approach at any time."*

Thus, by way of the instant petition, the petitioner has approached this Court third time seeking his bail. As observed above, previous bail petition of the petitioner, i.e., Cr.MP(M) No. 1364 of 2019, was dismissed by this Court on 19.08.2019 and now the petitioner has again approached this Court seeking his bail.

5. Needless to say that after dismissal of a bail petition, the bail petitioner, in a succeeding petition, has to successfully show before the Court, the change in the circumstances. It is well settled that the accused has a right to maintain successive bail petitions under changed circumstances and the change in the circumstances must be substantial having direct and consequential impact on the previous decision, whereby the bail was denied. The change(s) in the circumstances must not be trivial or cosmetic having no significance or of little or no consequence. It is also well settled that without substantial change in the circumstances, the subsequent bail petition would be merely review sought to the earlier petition, which was rejected, and such review is not permissible under the law. It is the duty of the Court to consider all the reasons and grounds whereupon the earlier bail petition was rejected and what are the fresh grounds worth consideration and ultimately warranting evaluation of fresh bail petition and leading the Court to take a divergent view from that of the

earlier view rejecting the petition. There must be change in fact situation or in law, compelling the Court to take different view. Thus, the Court has a narrow area to reconsider the successive bail petition and this narrow area is only change in circumstances.

6. The learned Senior Counsel for the petitioner has argued that now there is change in the circumstances as co-accused Nikhil Malik has been enlarged on bail by Hon'ble the Supreme Court. He has further argued that the petitioner only retaliated in self-defence, as the deceased initially shot from his pistol at brother of the petitioner and he sustained bullet injury, and this fact has also come in the prosecution story. He has further argued that the complainant party was aggressor and the brother of the petitioner sustained grievous injury. He has argued that the petitioner is behind the bars for the last more than four years and the trial is not likely to be completed soon. Now with the change in circumstances, the petition may be allowed and the petitioner may be enlarged on bail. Earlier a cancellation report qua the case registered against the complainant party was prepared, but now a cross case has been registered under Section 307 IPC against them and they are on bail. Conversely, learned Additional Advocate General has argued that there is no change in the circumstances, as no prosecution witness has been examined after the dismissal of the earlier bail petition, i.e., Cr.MP(M) No. 1508 of 2020, and the mere fact that co-accused Nikhil Malik, whose role in the commission of the offence is not akin to that of the petitioner, cannot be considered, as change in the circumstances. He has further argued that the petitioner cannot be released on bail, as it was the petitioner, who opened fire, and resultantly the deceased died and one more person sustained grievous injuries. He has argued that there are chances that in case the petitioner is enlarged on bail, he may tamper with the prosecution evidence and may also flee from justice. He has prayed that the bail application of the petitioner be dismissed.

7. In rebuttal, the learned Senior Counsel for the petitioner has argued that taking into consideration the change in the circumstances viz., co-accused Nikhil Malik has been enlarged on bail by the Hon'ble Supreme Court and the facts that the petitioner is behind the bars for the last more than four years and the trial is not likely to conclude soon and moreover the petitioner cannot be kept behind the bars for an unlimited period, so the petition may be allowed and the petitioner be released on bail.

8. As observed above, in successive petitions, the petitioner has to successfully show change in the circumstances. There must be substantial change in the circumstances, having direct impact on the previous rejection or refusal of the bail and in absence of such substantial change in the circumstances, the succeeding bail petition is merely review of the earlier petition.

9. During incisive consideration of all facets of the case, viz-a-viz, the established position of law, this Court is of the view that the petitioner has failed to show any substantial change in the circumstances. The so-called change in the circumstances that co-accused Nikhil Malik has been enlarged on bail by the Hon'ble Supreme Court has no direct impact on the circumstances, as in the present case the petitioner, as emanates from the prosecution story and from the records, opened fire and resultantly the deceased was killed and one more person sustained grievous injuries. So, the role of the petitioner is clearly severable and the petitioner cannot take advantage of the fact that one or more co-accused have now been enlarged on bail. The extant petition is more in the nature of review to earlier petition, which was dismissed, and fail to show any change in the circumstances.

10. The perusal of the records reveals that after the dismissal/rejection of the preceding petition, no prosecution witness was examined by the learned Trial Court. So, at this stage, after going through the records, this Court finds that there is no change in the circumstances and the circumstances existing when the earlier bail petition was dismissed by this Court, have not changed and they are the same. So, considering the gravity of the offence, the role of the petitioner in the alleged offence, the fact that the petitioner is in a position to tamper with the prosecution evidence and may also flee from justice, in case enlarged on bail, this Court is of the view that the present is not a fit case where the judicial discretion to admit the petition on bail is required to be exercised in his favour.

11. In view of what has been discussed hereinabove, the petition, which sans merits, deserve dismissal and is accordingly dismissed.

12. The views expressed hereinabove, are only confined to the extant petition and shall not be construed as an opinion expressed on the merits of the main case, which shall be adjudged on its own merits.

BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J

Vaibhav Sharma ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 1828 of 2020

Date of Decision: October 13 ,2020

Code of Criminal Procedure, 1973- Section 438 –Anticipatory Bail - -under 21 and 27A N D P S Act- Petitioner apprehending attest – For purchasing 14.20 gm of heroin with co-accused who was arrested for possessing the same- The quantity of substance seized is not commercial quantity- rigor of section 37 is not applicable-the bail application is on different parameters and similar to bail petition under regular statues - ---pretrial incarceration needs justification

depending upon offences heinous nature – Terms of sentence prescribed in the statue of such a crime- probability of accused fleeing from justice, hampering the investigation, criminal history of accused and doing away with victim and witnesses- The court is under an obligation to maintain a balance between all stakeholders and safeguard the interest of victim, accused,society and state While deciding bail application- courts should discuss evidence relevant only for determing bail- The possibility of the accused influencing course of the investigation, tampering with evidence, intimidating the witnesses and likely hood of fleeing from justice can be taken care of by imposing elaborative and stringent conditions – Bail granted.

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;
For the petitioner: Mr. Gautam Sood, Advocate.

For the respondent: Mr. Nand Lal Thakur, Addl. Advocate General.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.(oral)

For purchasing 14.20 grams of Heroin with the co-accused Sahil Bhardwaj who was arrested for possessing the same, and petitioner is now apprehending imminent arrest on being arraigned as an accused, has come up under section 438 CrPC, seeking anticipatory bail.

2. Based on the complaint of Sanjeev Kumar, Incharge SIU Solan, the police registered FIR No. 79 of 2020, dated 7.10.2020, under Sections 21 and 27A of the Narcotic Drugs & Psychotropic Substances Act, 1985 (in short NDPS Act), in Police Station Kandaghat, Distt. Solan, Himachal Pradesh, disclosing cognizable and non-bailable offences.

3. The petitioner's criminal history relating to the offences prescribing sentence of greater than seven years of imprisonment or when on conviction, the sentence imposed was more than three years: The contents of the petition and the status report do not reveal any criminal history.

4. Briefly, the allegations against the petitioner are that on 7.10.2020 at about 5.20 p.m., a team of SIU Solan was present at Waknaghat Bazar when it received a secret information that one person was selling heroin/chitta from his car near the main gate of Bahra University. On this information, after associating an independent witness, the said person was apprehended who revealed his name as Sahil Bhardwaj and from his car recovered 14.20 grams of heroin.

During interrogation of said Sahil Bhardwaj, he revealed that he alongwith Vaibhav Sharma, petitioner herein, had gone to Delhi from where they had purchased the contraband from two persons (Nigro).

5. The Counsel for the petitioner seeks bail and contends that the accused is innocent.

6. The contention on behalf of the State is that if this Court grants bail, such order must be subject to conditions, especially of not repeating the criminal activities.

ANALYSIS AND REASONING:

7. Section 2 (vii-a) of the NDPS Act defines commercial quantity as the quantity greater than the quantity specified in the schedule. S. 2 (xxiii-a) defines a small quantity as the quantity less than the quantity specified in the table of the NDPS Act. The remaining quantity falls in an undefined category, which is now generally called as intermediate quantity. All Sections in the NDPS Act, which specify an offense, also mention that minimum and maximum sentence, depending upon the quantity of the substance. Commercial quantity mandates minimum sentence of ten years of imprisonment and a minimum fine of Rupees One hundred thousand, and bail is subject to the riders mandated in S. 37 of NDPS Act.

8. The contraband involved is prima facie is not a Commercial quantity. As such, the rigors of Section 37 of the NDPS Act shall not apply in the present case. Resultantly, the present case is similar to other instances of the grant of bail in a penal offence.

9. In intermediate quantity the rigors of the provisions of Section 37 may not be justified- (Sami Ullaha v. Superintendent Narcotic Control Bureau, (2008) 16 SCC 471). 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.

10. 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.

11. 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. However, while deciding bail applications, the Courts should discuss evidence relevant only for determining bail. The difference in the order of bail and final judgment is similar to a sketch and a painting. However, some sketches are in detail and paintings with a few strokes.

12. An analysis of the evidence does not justify incarceration of the accused, nor is it going to achieve any significant purpose, making out a case for bail.

13. 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. In **Sushila Aggarwal**, (2020) 5 SCC 1, Para 92, the Constitutional bench held that unusually, subject to the evidence produced, the Courts can impose restrictive conditions.

14. 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, and in the event of arrest the petitioner shall be released on bail in the FIR mentioned above, on his furnishing a personal bond of INR 50,000/, (INR Fifty thousand only), with one surety for INR 50,000 (INR Ffty thousand only), to the satisfaction of the Investigator/

SHO of the concerned Police Station. The furnishing of bail bonds shall be deemed acceptance of all stipulations, terms, and conditions of this bail order:

a) 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).

b) 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.

c) The petitioner shall join and cooperate in the investigation, and failure to do so shall entitle the prosecution to seek cancellation of the anticipatory bail granted by the present order. (Kala Ram v. State of Punjab, 2018 (11) SCC 350).

d) 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.

e) 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.

f) 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.

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

h) 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.

i) 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.

j) 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.

k) 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 the concerned Court, if such stage arises.

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) 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.

n) 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 following the mandate of the Constitutional Bench in **Sushila Aggarwal,** (2020) 5 SCC 1, Para 92, wherein the Constitutional bench held that anticipatory bail can continue until the end of the trial; however, the Courts can limit the bail period's tenure if unique or peculiar features require.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. The Investigating Officer 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.

21. In return for the protection from incarceration, 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 VIVEK SINGH THAKUR, J.

Cr.M.P(M) No. 1808 of 2020

Abhishek Mangla .....Petitioner

Versus

State of H.P. .....Respondent

Cr.M.P(M) No. 1809 of 2020

Meenal Mangla .....Petitioner

Versus

State of H.P. .....Respondent

Cr.M.P(M) No. 1810 of 2020

Shirli Mangla .....Petitioner

Versus

State of H.P. .....Respondent

Cr.M.P(M) No. 1811 of 2020

Pat Ram Mangla .....Petitioner

Versus

State of H.P. .....Respondent

Cr.MP(M) Nos. 1808 to 1811 of 2020
Decided on: 27.10.2020

Code of Criminal Procedure, 1973- Section 438- Under Section 498-A, 504, 34 IPC and section 66 (E) and 67, IT Act- Relationship of husband and wife is a privileged relation – Institution of marriage inspires trust and confidence which leads to complete surrender of spouses to each other – This relation of mutual trust, faith and confidence creates sense of security – Such feeling inspires openness between husband and wife- Posting and uploading nude photographs of spouse particularly of wife, in public domain amounts to betray the mutual trust and confidence which marital relation implies- It is striping off a woman in public by the husband himself who is not only supposed but duty bound to protect her- It is not only serious but a heinous crime- Its impact on soul, mind and health of the victim is beyond comprehension, attracting provision of 498-A IPC- An act amounting to stripping of a woman in public disentitles a person from anticipatory bail- The section 438 Cr.PC is not framed to benefit such offenders- Particularly a husband who is accused of an offence amounting to stripping off his wife in public- Bail rejected.

For the petitioners: Mr. O.C. Sharma, Advocate through video conferencing.

For the respondent: Mr. Raju Ram Rahi, Dy. A.G. through video conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J. (Oral)

These four petitions preferred under Section 438 Cr.P.C are being disposed of by this common order as common status report filed on behalf of respondent-State is to be considered on the basis of common facts and circumstances.

2. Petitioner Abhishek Mangla is husband of complainant, whereas, Pat Ram Mangla, Shirli Mangla and Meenal Mangla are father, mother and sister of Abhishek Mangla.

3. Common status report filed on behalf of respondent-State has been taken on record, wherein contents of complaint submitted by the victim, on the basis of which FIR No. 41/2020 dated 5.10.2020 has been registered against the petitioners under Sections 498A, 504, 34 IPC and Sections 66(E) and 67 of the IT Act in Women Police Station, Mandi, District Mandi, has been reproduced.

4. According to the victim, after one month of solemnization of marriage with Abhishek Mangla, the petitioners had started harassing her on one or other pretext particularly for insufficient dowry. It is also case of the victim that there was some criminal case registered against the petitioners in which they were trying to get anticipatory bail and the father of the complainant had helped them in engaging an Advocate at Chandigarh but after getting bail, allegations were leveled by her father-in-law that the father of the complainant would have shared their money from the Advocate engaged by them and other incidents, which are not being reproduced here in detail, have also been stated in the complaint with respect to beatings, harassing and preventing from making calls to her parents and sisters. It is complained that even the calls of the complainant were being recorded by her husband. Being tired of atrocities of her in-laws, complainant had called her father and had come to her parental house at Mandi along-with him and at that time, after about 1½ months, her husband had come to Mandi and apologized for his conduct and sweared for not to repeat that whereupon complainant had agreed to accompany him with the consent of her far believing that he will not beat her. But immediately after reaching at home, he had again threatened her to teach a lesson to her father and thereafter again had started harassing and beating her and abusing her sister and parents.

5. It is also stated in the complaint that once, during night, Abhishek Mangla had snapped her nude photographs on his mobile and on refusal to allow that, he had expressed his anger whereupon victim had acceded to his request and out of fear, she had not raised any voice against him. On asking for reason to take such photographs, the husband of the complainant, at that time, had replied that he had done so causelessly/without any reason

('yooh hee'). However, thereafter her husband had uploaded her nude photographs on the internet for sometime and had removed after some time.

6. It is further case of the complainant that in September, 2020, husband of the complainant had dictated her to ask her father to provide scooty to him, failing which, he had threatened to post all nude posts on internet along-with name, address and mobile number of her father and when she requested to delete those nude photographs from his mobile then he had slapped her. At that time out of fear she had even urinated in her clothes and suffered fever also. When she narrated this incident to her father-in-law and mother-in-law, they had also justified the demand of their son and her sister-in-law had commencted that that it would not be easy to have scooty from the parents of the victim.

7. Not only this the husband of the victim had also uploaded nude photographs of the victim on facebook through fake facebook ID created by him in the name of victim and had also uploaded nude photographs of the victim as profile picture of that facebook ID and after taking screen shots thereof had sent photographs to the victim and had also uploaded videos and photographs wherein victim was nude. During investigation, 16 such screen shots have been produced before the police which were uploaded by the husband of the victim.

8. The petitioners have approached this Court for anticipatory bail. They have been enlarged on anticipatory bail on 9th October, 2020 with a direction to join the investigation. As per status report filed, they have joined the investigation and petitioner Abhishek Mangla has also produced his mobile and sim purported to be used by him. Learned counsel for petitioners submits that petitioners are ready to abide by any further condition imposed by Court for confirmation of their bail and they are also in a position and read to furnish local surety. Further that offence under Information and Technology Act (IT Ac(is not non-bailable and for other alleged offences, petitioners deserve to be enlarged on bail.

9. The offence under Sections 66(E) and 67 of the IT Act may be bailable offence, however, offence under Section 498A IPC is a non-bailable offence.

10. So far as the petitioners Pat Ram Mangla, Shirli Mangla and Meenal Mangla (Cr.M.P(M) Nos. 1809, 1810 and 1811 of 2020) are concerned, considering their role as indicated in status report and as alleged in the complaint, they are enlarged on bail subject to furnishing fresh bail bonds in the sum of ₹50,000/- each with one local surety each, as undertaken, in the like amount to the satisfaction of the Chief Judicial Magistrate, Mandi and also subject to the following conditions:-

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

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

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

iv) that the petitioners shall not commit the offence similar to the offence to which they are accused or suspected;

v) that the petitioners shall not misuse their liberty in any manner;

vi) that the petitioners shall not jump over the bail;

vii) that they shall furnish proof of their place of ordinary residence like certificate of Panchayat or any other authority which may be placed where his mother, brother or wife are residing and he shall keep on informing about the change in address, landline number and/or mobile number, if any, for their availability to Police and/or during trial; and

viii) they shall not leave India without permission of the Court.

ix) They shall not involve in commission of same and similar offence and in such eventuality, bail in present case shall also be liable to be cancelled.

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

12. In case the aforesaid petitioners violate any conditions imposed upon them, their bail shall be liable to be cancelled. In such eventuality prosecution may approach the competent Court of law for cancellation of bail, in accordance with law.

13. Learned trial Court is directed to comply with the directions issued by the High Court, vide communication No. HHC.VIG./Misc. Instructions/93-IV.7139 dated 18.03.2013.

14. Observations made in these petitions hereinbefore shall not affect the merits of the case in any manner and are strictly confined for the disposal of these bail applications.

15. The petitioners are permitted to produce copy of order downloaded from the High Court website and the trial Court shall not insist for certified copy of the order, however, he may verify the order from the High Court website or otherwise.

16. Relationship of husband and wife is a privileged relation. Institution of marriage inspires trust and confidence which leads to complete surrender of spouses to each other. This relation of mutual trust, faith and confidence creates sense of security and sometimes even more than parents and children. Sometime spouse feels more secured in shelter of life partner than mother's lap. Such feeling inspires openness between husband and wife.

17. Posting and uploading nude photographs of spouse, particularly of wife, in public domain amounts to betray the mutual trust and confidence which marital relations implies. It is stripping off a woman in public by the husband himself who is not only supposed but duly bound to protect her, it is not only serious but a heinous crime. It's impact on soul, mind and health of the victim is beyond imagination. It causes suffering to her beyond comprehension, attracting the provision of Section 498-A IPC. An act amounting to stripping off a woman in public, in my considered view dis-entitles a person from anticipatory bail.

18. I am of the considered view that extraordinary provision of Section 438 Cr.P.C, conferring discretion upon the Court to direct enlargement of a person on bail before his arrest, in the event of his arrest, is not framed to benefit such offenders particularly a husband who is accused of an offence amounting to stripping off his wife in public. Therefore, considering the given facts and circumstances of the case, nature and gravity of the accusations and impact thereof on the soul, mind and body of a woman, affecting her mental and physical health beyond comprehension, I do not find it fit to enlarge petitioner Abhishek Mangla on bail, exercising the power under Section 438 Cr.P.C. Hence, bail petition [Cr.M.P(M) No. 1808 of 2020] preferred by him is dismissed. Needless to say that he would not be entitled to any further protection of interim bail granted vide order dated 9.10.2020 in his favour.

19. Accordingly, Cr.M.P(M) Nos. 1809, 1810 and 1811 of 2020 are allowed and Cr.M.P(M) No. 1808 of 2020 is dismissed in aforesaid terms.

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

1. **Cr.M.P.(M) No.1746 of 2020**

Virender Kumar ...Petitioner.

Versus

State of Himachal Pradesh ..Respondent.

2. **Cr.M.P.(M) No.1782 of 2020**

Parmila Devi ...Petitioner.

Versus

State of Himachal Pradesh ..Respondent.

Cr.M.P.(M) Nos. 1746 & 1782 of 2020
Date of Decision: October 15, 2020

Code of Criminal Procedure, 1973- Under sections 363, 366-A 201 IPC & section 4 &17 POCSO Act- Victim in regular contact with petitioner for last five six months & maximum calls made by victim herself as per call detail reports- In first statement under section 161 & 164 cr.p.c-Victim stated that she had gone to the house of her cousin on her own willingness and she was not kidnapped by anybody and was not subjected to any sexual assault – She refused for her medical examination- Father first lodged missing report- Then on complaint of father, case was registered- Then victim supported the allegation of kidnapping and she was violated in her statements under section 161 & 164 Cr.PC- During medical examination, Medical Officer has not found any physical external or internal injuries on person of victim- Has not given any final opinion with respect to sexual assault upon the victim-swab and samples sent to RFSL-families of the accused and victim are in relation- fIt case for enlarging petitioner on bail-Allegations against co-accused of destruction of evidence by washing clothes and helping the accused in commission of crime.

For the Petitioner(s): Mr.Kush Sharma, Advocate, through Video Conferencing.

For the Respondent: Mr. Raju Ram Rahi, Deputy Advocate General, through Video Conferencing.

SI Piar Singh, Police Station Khundian District Kangra, H.P., present in person.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (oral)

These petitions, preferred to enlarge the petitioners on bail in case FIR No.90 of 2020 dated 12.09.2020, registered in Police Station Khundian District Kangra, H.P. under Sections 363, 366A and 201 of the Indian Penal Code (hereinafter referred to as 'IPC' in short) and Sections 4 and 17 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act' in short).

2. Status reports stand filed, wherein it is stated that on 12.09.2020 complainant Surjeet Singh had submitted a written application in Police Station Khundian, stating therein that his 17 years old daughter after leaving home on 11.09.2020 at 10.00 a.m. did not return till date and despite searching her at his own level everywhere in relations, she was not found anywhere and he had suspected that some unknown person had kidnapped his minor daughter. On the basis of this application, FIR in question, was registered.

3. It is stated in the status reports that during investigation it was found that victim had gone to her cousin's (daughter of Bua) matrimonial home in Village Bhadolikalan, Tehsil Jhanduta District Bilaspur on 11.09.2020 and during night intervening of 12.09.2020 and 13.09.2020 she was brought back by her sister and her statement was recorded in presence of her mother and at that time, victim, in writing, had refused to undergo medical

examination and thereafter, she was handed over through a memo to her parents. Her statements under Sections 161 and 164 of Cr.P.C. were also recorded on 12.09.2020 and 13.09.2020 respectively, wherein she had disclosed that she had gone to the matrimonial house of her cousin without telling anybody. In these statements she had not disclosed any kind of offence committed against her.

4. It is further stated in the status reports that on 28.09.2020 father of victim Surjeet Singh had submitted a written application in the office of Sub-Divisional Police Officer (SDPO) Jwalamukhi, stating therein that on 11.09.2020 petitioner-Virender Kumar had kidnapped his daughter and earlier he was not knowing about this and, therefore, he had lodged a missing report of his daughter in Police Station Khundian and thereafter, his daughter was recovered on 12.09.2020 and was handed over to them in Jwalamukhi Rest House and on 13.09.2020 they were called to the Court and without asking them (parents) statement of victim was recorded before the Magistrate. At that time, they were not knowing about the incident of rape happened with the girl and this came in their knowledge later on. After receiving this application, matter was referred to Police Station Khundian and Sections 366A and 376 of IPC and Section 4 of POCSO Act were inserted in report/FIR and medical examination of the victim was got conducted through lady Doctor in Civil Hospital Jwalamukhi in presence of her mother and Lady Constable Anuradha and samples were taken, preserved and sent for chemical analysis to RFSL. On 29.09.2020 statement of victim under Section 164 Cr.P.C. was again recorded before learned Judicial Magistrate 1st Class (2) Dehra. It is also stated in status report that thereafter petitioner-Virender Kumar had visited the Police Station on 30.09.2020 with the order of High Court, granting him anticipatory bail. It is also mentioned that at the time of commission of offence, age of the victim was 17 years 3 months and 4 days.

5. Record has also been produced. On perusal of record, it has been found that during investigation Call Detail Report (CDR) of the victim has also been taken, wherein it has been found that victim was in regular contact with petitioner-Virender Kumar since last five-six months and maximum calls have been made by the victim herself.

6. Firstly, in the statement recorded on 12.09.2020 under Section 161 Cr.P.C., victim had stated that she had gone to the house of her cousin on her own volition and she was not kidnapped by anybody and she had come back herself at her own will and she had not been violated or subjected to any sexual assault, and lastly she has stated that there was no role of anybody, in any manner, in leaving home by her.

7. In statement recorded on 14.09.2020 under Section 164 Cr.P.C. victim had stated that on 11.09.2020 at about 10.00 a.m. she had gone to the house of her cousin without telling anybody and next day i.e. on 12.09.2020 her sister Anuradha had brought her back.

8. After recovery victim was taken to the Hospital where she had stated that she was not interested to undergo medical examination and further that she was making such statement without any pressure from any side and her mother had also made statement that she was in agreement with her daughter and these statements were reduced into writing on MLC and victim and her mother had appended their signatures on it.

9. After receiving second written complaint from the father of victim, statement of victim was again recorded under Section 161 Cr.P.C., wherein she had stated that on 11.09.2020 petitioner-Virender Kumar had kidnapped after alluring her for marriage with her and that he is brother-in-law (Devar) of her cousin and for the last six months she had been talking with him on Mobile and he had taken her towards the house of his younger sister, where she was kept for one night and was violated by petitioner and on 12.09.2020 her sister had called petitioner-Virender Kumar and had asked about kidnapping of victim by petitioner-Virender which was replied by petitioner in affirmative and thereupon her cousin Anuradha and brother-in-law Pawan (husband of Anuradha) had taken her to Jwalamukhi to her parents and therefrom she had gone home.

10. In her second statement recorded under Section 164 Cr.P.C. on 29.09.2020, victim had stated that on 11.09.2020 petitioner resident of Village Bhadolikalan, Bilaspur had kidnapped her and taken her at about 10.00 a.m. towards Una, where his younger sister was residing and at that place accused had violated her and when he came to know about her Caste he had refused to marry her and thereafter his sister-in-law and his brother had dropped her at Jwalamukhi.

11. After receiving second complaint, victim was again subjected to medical examination and during examination Medical Officer has not found any physical external or internal injuries on the person of victim. Doctor has not given any final opinion with respect to sexual assault upon the victim. Though swab and samples of victim have been also sent to RFSL, but those samples and swabs have been taken after more than 15 days of the alleged happening and I do not think that report of such samples would be of any help to any side.

12. As is evident from the record and also endorsed by the Officer present in Court that cousin (daughter of Bua) of victim is already married to brother of the petitioner and both sides belong to Scheduled Caste category but different sub-category and families of the accused and Aunt (Bua) of victim are in relation.

13. From the CDR, it is evident that victim had been calling petitioner-Virender Kumar for number of times everyday and in the month of September 2020 itself she was in constant touch of the petitioner and had been calling about and even more than 10 times each day.

14. Allegation against co-accused Parmila Devi (petitioner in Cr.M.P.(M) No.1782 of 2020) is that she had destroyed the evidence by washing clothes and helping the petitioner in commission of crime and thus, she has been added as an accused under Section 201 IPC.

15. Considering entire given facts and circumstances, without commenting upon evidence on record, which is to be appreciated by the trial Court at the time of conclusion of trial, I find that it is a fit case for enlarging the petitioners on bail.

16. Accordingly, petition(s) are allowed and petitioners are ordered to be released on bail in case FIR No.90 of 2020 dated 12.09.2020, under Sections 363, 366A and 201 IPC and Sections 4 and 17 of POCSO Act, registered in Police Station Khundian District Kangra, H.P., on their furnishing personal bond in the sum of `50,000/- each with one surety each in the like amount, within three weeks from today to the satisfaction of JMIC (2), Dehra, subject to following conditions:-

(i) That the petitioners shall make themselves available to the police or any other Investigating Agency or Court in the present case as and when required;
(ii) that the petitioners shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to Court or to any police officer or tamper with the evidence. They shall not, in any manner, try to overawe or influence or intimidate the prosecution witnesses;
(iii) that the petitioners shall not obstruct the smooth progress of the investigation/trial;
(iv) that the petitioners shall not commit the offence similar to the offence to which they are accused or suspected;
(v) that the petitioners shall not misuse their liberty in any manner;
(vi) that the petitioners shall not jump over the bail; and
(vii) that they shall not leave the territory of India without prior information. They shall inform the Police/Court their contact numbers and shall keep on informing about change in addresses and contact numbers, if any, in future.

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

18. In case the petitioners violate any condition imposed upon them, their bail shall be liable to be cancelled. In such eventuality, prosecution may approach the competent Court of law for cancellation of bail, in accordance with law.

19. JMIC (2), Dehra 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.

20. Observations made in these petition(s) hereinbefore, shall not affect the merits of the case in any manner and are strictly confined for the disposal of the bail application.

21. Registry to transmit a copy of this order to the trial Court through E-mail. Copy dasti.

BEFORE HON'BLE MS. JYOTSNA REWAL DUA, J.

Kuldeep Singh .....Petitioner

Versus

The State of Himachal Pradesh Respondent

Cr.MP(M) No.1220 of 2020
Decided on: 15th October, 2020

Code of Criminal Procedure, 1973-Section 439 Cr.P.c Under section 20 of ND&PS Act-Commercial quantity of 1.073 kg of cannabis, allegedly recovered from the petitioner-Contraband involved in the case was of commercial quantity, thereby attracting the provision of section 37 of NDPS Act where in for enlargement on bail,besides compliance of section 439 Cr.P .c the twin conditions viz- Existence of reasonable grounds for believing that the accused is not guilty of offence alleged and (ii) He is is not likely to commit any offence while on bail are required to be recorded/ satisfied .It is not very often that satisfaction of these two condition get recorded in case involving commercial quantities of contraband.

For the Petitioner: Mr. N.K. Thakur, Senior Advocate alongwith Mr. Divya Raj Singh, Mr. Karan Veer Singh and Mr. AtulKumar, Advocates.

For the Respondent: Mr. Anil Jaswal, Additional Advocate General.

(Through Video Conference)

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge (Oral)

Commercial quantity of 1.073 Kgs of cannabis was allegedly recovered from the petitioner on 19.11.2019. FIR No.274 of 2019 was registered against him on 20.11.2019 at Police Station Nurpur, District Kangra, under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act'). Petitioner was taken into custody on 20.11.2019. He is confined in jail for the last about a year. Through present petition, he seeks enlargement on bail under Section 439 of the Code of Criminal Procedure (Cr.PC in short).

2. The bail petition was heard on 19.08.2020, when respondent-State was directed to make available the records of the case. Matter thereafter was heard on 01.09.2020 through video conference and on 02.09.2020 in open Court. During arguments, Sh. N.K. Thakur, learned Senior Counsel

appearing for the petitioner, while raising the plea of innocence and false implication of the petitioner, narrated the events of 19.11.2019 as per petitioner's version. The narration implicated those very police personnel, who were members of the patrolling party, which had statedly recovered the contraband from the petitioner. Contraband involved in the case was of commercial quantity, thereby attracting the provisions of Section 37 of the NDPS Act, wherein for enlargement on bail, besides compliance of Section 439 Cr.PC, the twin conditions, viz. (i) Existence of reasonable grounds for believing that theaccused is not guilty of alleged offence; and (ii) He is not likely to commit any offence while on bail, are required tobe recorded/satisfied. It is not very often that satisfaction of these two conditions get recorded in cases involving commercial quantity of contraband. However, minute by minute, sequence of events of 19.11.2019 recounted by learned Senior Counsel for the petitioner during the arguments, led the Court to pass following order on 02.09.2020:-

"02.09.2020 Present: Mr. N.K. Thakur, Senior Advocate alongwith Mr. Divya Raj Singh, Mr. Karan Veer Singh and Mr. Atul Kumar, Advocates, for the petitioner.
Mr. Anil Jaswal, Additional Advocate General with Mr. Manoj Bagga, Assistant Advocate General, for the respondent-State.
HC Vinod Kumar No.48, Police Station Nurpur, District Kangra & HC Rishi Vansh, SNCCIFU, CID Unit, Kangra, present alongwith record.

Petitioner is accused of possessing commercial quantity of Cannabis measuring 1.73 kg allegedly recovered by a police patrolling party from a Nano Car bearing No.HP 38D 1491 owned by him. The recovery is stated to have been effected on 19.11.2019 at around 6:15 pm at Kulhari Mod, Nurpur, District Kangra. The status report records the factum of petitioner standing alongside his aforenumbered car and on seeing the police patrolling party, throwing a bag held by him, inside the car, from which the recovery was allegedly effected. FIR No.274 of 2019 was registered the next day, i.e. on 20.11.2019 at Police Station Nurpur, District Kangra.

2. Whereas, according to the petitioner, the Nano car was parked and locked by him around Mangal Kiryana Shop near Kandwal on 19.11.2019. This vehicle was unauthorizedly driven away from the said place by some unknown persons at around 3:12 pm, who according to learned Senior Counsel, the petitioner apprehends, were policemen. The incident is said to have been captured on CCTV camera installed in front of Mangal Kiryana Shop. It has further been submitted by learned Senior Counsel that a Wagon R car bearing No.HP 68B 7888, registered in the name of Rishi Vansh (Head Constable and IO in the case), was parked near Kandwal Barrier on 19.11.2019 since 3:08 pm. Three persons alighted from this vehicle at around 3:39 pm and chased the petitioner near Kandwal Toll Tax Barrier. At 3:43 pm, these persons after

overpowering the petitioner, hurled him inside another vehicle (Hyundai i20) bearing No.HP 57A 4001 (registered in the name of Manjeet Kumar, IO in the case). Whereafter both these cars Hyundai i20 and Wagon R, reversed back to Nurpur side. It has been submitted that these incidents at Kandwal Toll Tax Barrier, happened between 3:08 pm to 4:00 pm on 19.11.2019 have also been captured in the CCTV camera installed at Kandwal Toll Tax Barrier.

3. The record shows that one Sh. Hardeep Singh, brother of the petitioner, moved an application before the learned Additional Chief Judicial Magistrate, Nurpur, District Kangra, seeking direction that footage of the CCTV cameras installed at Kandwal Toll Tax Barrier and Mangal Kiryana Shop at Kandwal be got collected to enable the petitioner to prove his innocence. In this application, learned Additional Chief Judicial Magistrate, Nurpur, passed following order on 19.12.2019:-

"19.12.2019 Pr:- Shri Tippu Khan, Advocate, for the applicant.

: Shri Tarsem Kumar, Ld. APP, for the State.

: ***HC Vinod Kumar No.78, I.O. Police Station, Nurpur in person along with case file.***

Ld. Counsel for the applicant as well as the Investigating Officer present in the Court have submitted that CDs of the CCT footage of the relevant date and time have been procured by the police*. In view thereof, the application has now become infructuous and accordingly, the same is hereby dismissed as such. Papers be tagged with the concerned case FIR and be sent to the Court concerned.*

Announced *Sd/-*
19.12.2019. *(Nitin Mittal),*
Addl. Chief Judicial Magistrate, Nurpur, District Kangra HP."

4. Charge-sheet was presented before the learned Trial Court on 17.02.2020. Indisputably, the footage of relevant date and time of the CCTV cameras installed at the two locations in question stated to have been procured by the police and taken note of by the learned Additional Chief Judicial Magistrate, Nurpur, District Kangra in the above extracted order dated 19.01.2019, has not been made part of the charge-sheet. Status report does not indicate any previous criminal antecedent of the petitioner.

5. Petitioner alongwith the instant bail petition has placed on record a pen drive statedly containing footage from the aforementioned CCTV cameras of relevant date and time. Heavy reliance has been placed upon the footage of CCTV cameras for proving innocence of the

petitioner, to make out reasonable grounds that he was not guilty of the offences and thus, entitled to be released on bail under Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

The Court cannot close its eyes to the above submissions and facts placed on record, even though it is a bail petition. Ground of false implication has been strongly urged. Serious allegations levelled against the police officials in the facts and circumstances of the case as have been projected, cannot be brushed aside. Hon'ble Apex Court has repeatedly held that fundamental rights guaranteed to the citizens have to be zealously guarded. Investigation has to be necessarily fair and credible. It is, therefore, felt that the matter needs to be inquired into by higher authority. Accordingly, the Superintendent of Police, Kangra at Dharamshala, through the learned Additional Advocate General, is directed to inquire into the above aspects and find out the truth in the allegations levelled by the petitioner. The inquiry shall be conducted by the Superintendent of Police, Kangra at Dharamshala, himself within a period of three weeks from today and inquiry report shall be made available to the Court in a sealed cover on the next date.

It shall be open for the petitioner to present the footage of CCTV cameras available with him alongwith his representation to the Superintendent of Police, Kangra at Dharamshala, through his brother Hardeep Singh/any of his relation, on 4th September, 2020 by 5:00 pm.

List on 23rd September, 2020.

Authenticated copy of this order be supplied to learned counsel for the parties by the Secretary."

3. Inquiry report in sealed cover has been supplied by Sh. Anil Jaswal, learned Additional Advocate General, which is made part of the Court file. In this detailed inquiry report running into seventy pages, the Superintendent of Police, Kangra at Dharamshala, has thoroughly examined the matter from all angles. Statements of 15 persons, viz. Sh. Hardeep Singh S/o Sh. Bishan Singh, Sh. Daleep Kumar S/o Sh. Kartar Chand, Sh. Darshan Singh S/o Sh. Pritam Singh, Sh. Mangal Singh S/o Sh. Paddu

Ram, Sh. Randhir Singh S/o late Sh. Kuldeep Singh, Sh. Arvind Kumar Guleria S/o late Sh. Dhyan Singh, Sh. Jarnail Singh S/o Sh. Pinju Ram, Sh. Chanchal Singh S/o Sh. Jagdish Singh, Sh. Raghuvir Singh S/o Sh. Paddu Ram, Sh. Karan Singh S/o Sh. Yudhvir Singh, HC Rishi Vansh, IO SNCC Field Unit Kangra, HHC Manjeet Singh, SNCC Field Unit Kangra, HC Vinod Kumar No.48, Police Station Nurpur, Constable Rocky Kumar, SNCC Field Unit Kangra and Sh. Kuldeep Singh S/o Sh. Bishan Singh (petitioner), were recorded. These included accused/petitioner-Kuldeep Singh, his brother Hardeep Singh, HC Rishi Vansh, HHC Manjeet Singh, SNCC Field Unit Kangra, HC Vinod Kumar and Constable Rocky Kumar, SNCC Field Unit Kangra. Call detail reports of mobile numbers belonging to accused/petitioner, HC Rishi Vansh and HHC Manjeet Singh were collected and analysed. Tower mapping of CDRs were obtained. CCTV footage regarding the incidents of 19.11.2019, provided by Sh. Hardeep Singh pertaining to Toll Tax Barrier Kandwal, Mangal Kiryana Store and Police Post Kandwal were sent to State Forensic Science Laboratory (SFSL), Junga for expert opinion regarding addition, deletion, editing or tampering with the footages. SFSL Junga reported the footage as genuine, continuous and without any editing. The footage was comprehensively examined during inquiry. After scrutinizing the entire record, the Superintendent of Police, Kangra at Dharamshala, recorded his findings as under:-

> "FINDINGS:-
>
> On The basis of all the evidence i.e. CCTV footages, statements of witnesses and CDRs, it is conclusively substantiated that Kuldeep Kumar was inside the Wagon R HP68B 7888 which came at Kandwal Toll barrier at 03:08 pm on 19.11.2019 and got parked near Toll Barrier. At around 03:39 PM Kuldeep Singh ran from this Wagon R towards Baba Peer Mandir but was chased by two occupants of this car. After few minutes, he was caught in the fields across the railway track and was put in the i20 car No.HP 57A 4001 and taken towards Jassur. Thereafter, as per police record, Kuldeep Singh was caught at 06:15 PM with 1 kg and 073 gms of charas at Defence road Nurpur. The Wagon R HP 68B 7888 is owned by Head Constable Rishi Vansh who is the IO of this case and i20 car No.HP 57A 4001 is owned by HHC Manjeet Singh who was member of SNCC team which caught Kuldeep with

Charas and registered case against him. Since none of the witnesses have identified the persons who had chased and picked up Kuldeep Singh, so it cannot be conclusively stated as to who picked up Kuldeep Singh from the Toll Barrier Kandwal. However, Kuldeep Singh stated that he was picked up by three unknown persons and made to sit in a Car. It is only after this that Kuldeep Singh speaks about involvement of Manjeet Singh when he was taken to Jassur in the car by four persons. It is also apparent that KuldeepSingh has only identified Manjeet Singh and none else. From the detail of involved vehicles, the role of SNCC officials cannot be denied. The Nano car of Kuldeep Singh bearing registration number HP 38D 1491 was removed by some unknown person from Kandwal and driven towards Nurpur at around 04:17 PM (as per PP Kandwal CCTV footage time) and this car, as per police record, was used in the commission of the offence by Kuldeep Singh. Witnesses have also not been able to identify the persons involved in this act.

In view of the findings arrived at, the SDPO Nurpur has been directed to conduct further investigation in the case FIR No.274/2019 registered under NDPS Act in the Police Station Nurpur. Moreover, necessary information is being shared with DIG SNCC Shimla for taking appropriate action against the police officials namely Head Constable Rishi Vansh and HHC Manjeet Singh posted with SNCC FU District Kangra, in accordance with law.

It is respectfully prayed that the detailed enquiry report into the allegations projected by the petitioner may kindly be taken on record in the interest of justice please."

4. In view of above extracted findings recorded by the Superintendent of Police, Kangra at Dharamshala, theCourt has no hesitation to observe that there exist sufficient and reasonable grounds to believe about the petitioner being not guilty of the offences alleged against him in the FIR in question. Status report has not indicated any previous criminal history of the petitioner. Therefore, it can be reasonably believed that the petitioner is not likelyto commit offences while on bail. The requirements of Section 37 of the NDPS Act, which are in addition to the provisions of Section 439 of the Code of

Criminal Procedure, having been met in the instant case, this bail petition is allowed. Petitioner is ordered to be enlarged on bail on his furnishing personal bond in the sum of Rs.50,000/- (Rupees Fifty Thousand only) with one local surety in the like amount to the satisfaction of the learned trial Court having jurisdiction over the Police Station concerned, subject to the following conditions:-

(i). The petitioner shall join and cooperate the investigation of the case as and when called for by the Investigating Officer in accordance with law.

(ii). The petitioner shall not temper with the evidence or hamper the investigation in any manner whatsoever. The petitioner will not leave India without prior permission of the Court.

(iii). The petitioner shall not make any inducement, threat or promise, directly or indirectly, to the Investigating Officer or any person acquainted with the facts of the case to dissuade him/her from disclosing such facts to the Court or any Police Officer.

(iv). Petitioner shall attend the trial on every hearing, unless exempted in accordance withlaw.

(v). Petitioner shall inform the Station House Officer of the concerned police station about his place of residence during bail and trial. Any change in the same shall also be communicated within two weeks thereafter. Petitioner shall furnish details of his AadharCard, Telephone Number, E-mail, PAN Card, Bank Account Number, if any.

(vi). Petitioner shall not indulge in any criminal activity.

In case of violation of any of the terms & conditions of the bail, respondent-State shall be at liberty to move appropriate application for cancellation of the bail. It is made clear that observations made above are only for the purpose of adjudication of instant bail petition and shall not be construed as an opinion on the merits of the matter. Learned Trial Court shall decide the matter without being influenced by any of the observations made hereinabove. Before parting, I must place on record appreciation for the painstaking efforts put in by Sh. Vimukt Ranjan, Superintendent of Police, Kangra at Dharamshala, in conducting a fair and comprehensive inquiry during COVID times. It is hoped and expected that on the basis of the inquiry report, all requisite actions required to be taken, not only for the petitioner, but for the concerned police officials as well, shall be taken to their logical conclusion by all concerned higher authorities within a reasonable period.

"Down these mean streetsA man must go,
Who is not himself mean
And who is neither tarnished nor afraid."
-Raymond Chandler

The reputation and morale of disciplined force should not be allowed to be lowered down by any black sheep.

With the aforesaid observations, the present petition stands disposed of, so also the pending miscellaneous applications, if any.

Copy dasti.

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

Ramesh Chand ....Petitioner.

Versus

State of Himachal Pradesh & others ... Respondents.

CWPOA No.5603 of 2019
Decided on: 16.10.2020

Constitution of India, 1950-Article 226-It is settled law that ordinarily, when candidates are considered for promotion by the Departmental Promotion committee, their eligibility is seen as on date when the departmental promotion committee meets- The candidates who stood promoted teachers eligibility test in the year 2013 were senior to petitioner as junior basic teacher- As on the date when the departmental promotion committee met for effecting promotion to post of trained graduate teacher (TGT) Arts all the candidates were possessing the requisite qualification- That being the case, but natural when persons senior to petitioner fulfilling eligibility criteria were available for being promoted to the post of teachers eligibility test, there is no infirmity in the act of respondents of promoting said incumbent-the eligibility of a candidate has to seen as on the date when departmental promotion committee meets unless and until the recruitment and promotion rules specifically provides that a candidate who has passed teachers eligibility test first in time shall have a prior right of consideration ,in absence thereof petitioner who might have passed teachers eligibility test before their seniors can not have a superior claim over their seniors who otherwise fulfilled the eligibility criteria as on the date of meeting of departmental promotion committee.

For the petitioners : Mr. Adarsh K. Vashista, Advocate.

For the respondents : Mr. Sumesh Raj, Mr.Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocate Generals.

(Through Video Conferencing).

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

By way of this petition, petitioner has prayed for the following relief:-

"i) That the respondents may kindly be directed to include the name of the applicant in the panel prepared by the respondent Department for promotion to

> the post of T.G.T. (Arts) from the post of TET pass J.B.T. and the respondents may kindly be directed to consider the case of the applicant for promotion to the post of T.G.T. (Arts) from the post of J.B.T. against the quota meant for St. candidate, in the interest of justice".

2. Brief facts necessary for the adjudication of the present petition are that the petitioner herein is aggrieved by the act of the respondents of purportedly not promoting him to the post of Junior Basic Teacher (J.B.T.) against Scheduled Tribe Quota when promotions of other eligible Junior Basic Teachers were done in the year 2013 despite availability of vacancies. To demonstrate the factum of availability of the vacancies, the petitioner has appended with the petition as Annexure P-6, the information obtained under Right to Information Act from the office of Deputy Directory Elementary Education, Himachal Pradesh, in terms whereof at the relevant time, against total 8 vacancies available of Junior Basic Teachers, 8 were to be filled up from amongst Scheduled Tribe candidates and only 5 were filled up against 108 available vacancies. Another contention which has been raised by the petitioner is that in terms of this information provided under Right to Information Act, all the incumbents who stood promoted had passed their Teachers' Eligibility Test in the year 2013, whereas the petitioner had passed the said test in the year 2012, meaning thereby that he had a right to be considered before the incumbents who stood promoted against the post of Junior Basic Teacher. The stand of the State is that the date of passing of Teachers' Eligibility Test is not material so as to consider the eligibility of the candidates on the date of effecting promotions because the promotion has to be made in terms of the Recruitment and Promotion Rules and when other persons senior to the petitioner were found eligible for promotion against the post of Junior Basic Teacher who might have passed Teachers' Eligibility Test after the petitioner, said incumbents could not have been ignored and this is exactly what was done by the State. Learned Additional Advocate General further submits that in the year 2013, only 5 vacancies were filled up and thereafter also vacancies were filled up as is evident from the instructions which stood imparted to this Court also, which stand incorporated in its order dated 28.09.2020, in terms whereof remaining vacancies were subsequently filled up by promoting Scheduled Tribe candidates and petitioner in terms of his seniority also stood promoted to the post in issue on 26.10.2016. Learned Counsel for the petitioner in rebuttal submits that the act of the State of not considering the petitioner for promotion before those candidates who had passed their Teachers' Eligibility Test in the year 2013 is arbitrary and the petitioner had a right to be promoted before the said incumbents.

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

4. In my considered view, there is a fallacy in the contention of the petitioner that simply because he had passed his Teachers' Eligibility Test in the year 2012 i.e. before the candidates who were promoted in the year 2013 against the post of Teachers' Eligibility Test, therefore, he had a right to be considered for promotion over and above those incumbents who had passed Teachers' Eligibility Test thereafter.

5. This, I say for the reason that it is settled law that ordinarily when candidates are considered for promotion by the Departmental Promotion Committee, their eligibility is seen as on the date when the Departmental Promotion Committee meets. It is not in dispute that the candidates who stood promoted as Teachers' Eligibility Test in the year 2013 were senior to the petitioner as Junior Basic Teacher. As on the date when the Departmental Promotion Committee met for effecting promotion to the post of Trained Graduate Teacher (T.G.T.) Arts, all the candidates were possessing the requisite qualification. That being the case, but natural when persons senior to the petitioner fulfilling eligibility criteria were available for being promoted to the post of Teachers' Eligibility Test, then there is no infirmity in the act of the respondents of promoting said incumbents. This Court reiterates that as the eligibility of a candidate has to be seen as on the date when the Departmental Promotion Committee meets then until and unless the Recruitment and Promotion Rules specifically provide that a candidate who has passed Teachers' Eligibility Test first in time, shall have a prior right of consideration, then in absence thereof persons like the petitioner who might have passed Teachers' Eligibility Test before their seniors cannot have a superior claim over their seniors, who otherwise fulfilled the eligibility criteria as on the date of meeting of Departmental Promotion Committee.

6. In view of the observations made hereinabove, as this Court does not finds any merit in the present petition, the same is dismissed. Pending miscellaneous applications, if any, also stand dismissed.

BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J

Parminder Thakur ....Petitioner

Vs.

Manager, The H.P.State Cooperartive
Agricultureand Rural Development Bank Limited. .....Respondent

Cr. Revision No.:87 of 2020
Date of Decision: 26.10.2020

Negotiable Instruments Act, 1881- striking defence evidence dated 30.1.2020 by trial court in complaint under section 138 N. I Act- Keeping in view that it is not huge number of

opportunities and medical certificate annexed by accused- One final opportunity was given subject to deposite of Rs. 10,000/- in National Disaster Response Fund.

For the petitioner: Mr. J.L.Bhardwaj, Advocate
For the respondent: Mr. Narender Thakur, Advocate.

(**Through Video Conferencing**)
The following judgment of the Court was delivered:

Anoop Chitkara, Judge *(Oral):*

Having been arraigned as an accused in complaint under section 138 of Negotiable Instruments Act, 1881 filed for bouncing of cheque amounting to Rs. 10,55,000/-, the complainant- Bank filed a criminal complaint against the petitioner/accused in the Court of Judicial Magistrate, 1st Class, Arki, District Solan.

2. During the pendency of prosecution, vide order dated 30.01.2020, the trial Court struck off evidence of the accused because despite various opportunities, he did not lead any defence evidence.

3. Challenging the closure of the defence evidence, the petitioner came before this Court by way present criminal revision petition on the ground that due to ill-health, he could not lead defence evidence.

4. I have heard Mr. J.L. Bhardwaj, learned counsel for the petitioner, and Mr. Narender Thakur, learned counsel for the respondent- Bank and have gone through the records.

5. Mr. J.L.Bhardwaj, learned counsel for the petitioner submits that the petitioner would also make an endavour to settle the entire dispute with the bank and in case, the petitioner is given an opportunity to lead evidence, the same shall be completed in the month December, 2020.

6. Without adverting to the merits of the petition and given the fact that it is not a huge number of opportunities, the court has afforded to the accused and also the medical certificate annexed by him, one final opportunity can be given to the accused to lead defence evidence. However, such opportunity is subject to the petitioner paying a compensation of Rs. 10,000/- by depositing the same in the account of National Disaster Response Fund bearing Account No. 10314382194, IFSC SBIN0000625, State Bank of India, Central Sectt. Branch, New Delhi (for NEFR/RTGS) within a week from

today. After depositing the amount, print out of the same be filed by the learned counsel for the petitioner in the Registry and one print out of the same attested to be a true copy, be produced before the learned trial Court.

7. With these observations, the present revision petition is allowed and the order dated 30.01.2020, passed by learned JMIC, Arki, District Solan, H.P is set aside and the accused is afforded one opportunity to lead defence evidence by 31.12.2020.

8. It is clarified that the petitioner would have the time to lead defence evidence on or before 31.12.2020. The parties through their counsel are directed to appear before the learned trial Court on 03.12.2020.

9. The petition is disposed of in the above terms, so also the pending miscellaneous application(s), if any.

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

Chura Mani ...Petitioner

Versus

Harinder Singh ...Respondent

CMPMO No. 378 of 2020
Date of Decision: 28.10.2020

Negotiable Instruments Act, 1881- Closure of right of defendant to lead evidence dated 6.3.2020 by Ld. Civil Judge Court No. 4 Shimla- Petitioner- 86 years old lady- Witnesses could not be produced for bad weather- Considering the circumstances- One more opportunity granted to lead evidence subject to payment of costs of Rs. 3000/- to plaintiff.

For the petitioner: Mr. Peeyush Verma, Advocate.
For the respondent: Ms. Seema K. Guleria, Advocate.

(Though Video Conferencing)

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (Oral)

Present petition has been filed against the order dated 06.03.2020, passed by learned Civil Judge, Court No.4, Shimla, H.P., whereby right of the petitioner-defendant, to lead evidence, has been closed by the order of the Court.

2. No reply is intended to be filed on behalf of the respondent, rather it is submitted that the petition can beadjudicated and decided on the basis of material available on record.

3. Perusal of record placed before me indicates that on 25.10.2019, evidence of plaintiff was closed and the case was fixed for recording the evidence of defendant on28.11.2019 and the defendant was directed to take steps forthe said purpose within seven days.

4. On 28.11.2019, no defence witnesses were present and steps were also not taken on the part of defendant. On request of defendant, the case was adjourned for 24.12.2019for recording the evidence of defendant.

5. Order dated 24.12.2019 has not been placed on record. Learned counsel for the petitioner submits, which is not disputed, that on 24.12.2019, for absence of learned Presiding Officer, cases were not taken and the present case was taken on 06.11.2020 for proper orders, as is evident from the copy of order dated 06.01.2020, placed on record. On 06.01.2020 case was adjourned for 04.03.2010, for recording the evidence of defendant with rider that it was listed opportunity.

6. On 04.03.2020, no witness of defendant was present in the Court and time was prayed on behalf of the defendant, which was allowed as last and final opportunity and case was ordered to be listed on 06.03.2020 for recording evidence of defendant with the rider that no further date would be given for the said purpose.

7. On 06.03.2020 again, no witness was present and in view of order passed on previous date, the right of defendant to lead the evidence was closed by order of the Court.

8. It is case of the petitioner that she is 86 years old lady and is residing in village Lohrigar in Tehsil Kumarsain and for coming to Shimla, she has to cross the Narkanda Pass and on 04.03.2020, there was heavy snow fall and on the said date road was closed and because of old age she was unable to come to Shimla to attend the Court to produce the witnesses, which were and are to be produced by her on self responsibility. It is further case of the petitioner that practically only two effective opportunities have been granted to the petitioner i.e., one on 25.10.2019, when the case was listed for recording of the evidence of defendant on 28.11.2019 and secondly, on 06.01.2020, when the

case was listed for recording the evidence of defendant on 04.03.2020 and further that at the time of second opportunity, defendant and her witnesses could not be present in the Court for no fault on their part but for bad whether condition as stated supra.

9. It is further submitted that purported third opportunity granted to the petitioner was in fact no opportunity as only two days time was granted whereas the reasons, for which petitioner and her witnesses could not be present on 04.03.2020, were still existing on that day also.

10. Learned counsel for the respondents submits that the respondent, who is more than 60 year old, has filed suit for recovery of rent for which the respondent is entitled for possession of defendant of premises of respondent as a tenant for the last three years and respondent is contesting the suit since 2017 whereas defendant has adopted delaying tactics in order to defeat the claim of the plaintiff. She further submits that sufficient time was granted to the petitioner since 25.10.2019, to lead the evidence and, therefore, she is not entitled for any further opportunity. In alternative it is submitted that in any case if, by taking sympathetic view, the Court purposes to grant further time to the petitioner to lead evidence then only one opportunity be granted to the petitioner that too subject to payment of some costs.

11. In view of the material placed before me, I find force in the arguments put forth on behalf of the petitioner that the third opportunity, granted to the defendant to lead evidence, in fact was no opportunity at all for want of reasonable time between two dates particularly keeping in view weather conditions and more particularly when for the second time, in December 2019, witnesses could not be examined for non availability of the Presiding Officer. There may be cases where the parties may be at fault by taking unnecessary adjournments and in such eventuality even a one day time may be reasonable opportunity to such party to lead evidence but not in the given facts and circumstances of the present case.

12. Considering the entire facts and circumstances of the case, one more opportunity, as prayed, on behalf of the defendant/petitioner to lead her evidence on herselfresponsibility, is granted to her but subject to payment of costs of Rs.3,000/- payable to the respondent/plaintiff on or before the date fixed for recording evidence of the defendant before learned Civil Judge, Court No.4, Shimla.

Petitioner is directed to produce herself and her witnesses before the learned trial Court on 23.11.2020, for their examination and cross examination. No further opportunity shall be granted to the petitioner to lead evidence on her part. In case for any reason, not attributable to the defendant/ petitioner, evidence is not recorded on that day, then another subsequent date shall be fixed by the Court to record evidence of the defendant but not later than 15.12.2020. No further opportunity shall be granted for leading the evidenceof defendant.

13. Petition is disposed of in the aforesaid terms.

Parties are directed to appear before the learned trial Court either in person or through their counsel on **09.11.2020.**

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

Bhupinder Singh ....Petitioner

Versus

State of Himachal Pradesh & another ...Respondents

CWP No. 2098 of 2019
Decided on: 15th October, 2020

Constitution of India, 1950:-Section 226-Aggrieved by non-selection to the post of TGT[non medical] in the general[BPL] category-petitioner did not file/ prefer any objection to the provisional key answer dated 11.5.2019 and even thereafter to the final key and having failed to do so , it clearly estopped the petitioner from filing the petition that revised key answers particularly at Sr. No.2, 10, 11 & 114 were incorrect- The Petitioner after having taken calculated chance- appeared in the selection process without an demur – No challenge to process/key answer- Relief declined by applying the principles of estopple acquiescence and waiver- The principle apply to the particiption in the selection process and not any illegalitty committed during selection process which is not pleaded / challenged in the case.

Cases referred:
Madan Lal v. State of J&K [(1995) 3 SCC];
Marripati Nagaraja v. State of A.P.[(2007) 11 SCC 522];
Dhananjay Malik v. State of Uttaranchal [(2008) 4 SCC 171;
Meeta Sahai Versus State of Bihar & Ors., (2019) 17 Scale 718;
Anupal Singh and others Versus State of Uttar Pradesh through Principal Secretary, Personnel Department and others, (2020) 2 SCC 173;

Richal and others Versus Rajasthan Public Service Commission, (2018) 8 Supreme Court Cases 81;

For the petitioner: Mr. Vinay Sharma, Advocate.

For the respondents: Mr. Ashok Sharma, Advocate General with Mr. Vinod Thakur, Mr. Shiv Pal Manhans, AdditionalAdvocate Generals, Ms. Seema Thakur, Mr. Bhupinder Thakur &Mr. Yudhvir Singh Thakur, Deputy Advocates General, for respondent No.1-State.

Mr. Angrez Kapoor, Advocate, for respondent No.2.

Through Video Conferencing

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge *(Oral)*

Aggrieved by non-selection to the post of TGT(Non-Medical) in the General (BPL) category, the petitioner has filed the instant petition for grant of substantive reliefs:-

I. *"Issue a writ of certiorari to quash annexure P-6, i.e. revised answer key and annexure P-5 i.e. notification/final result for the post of TGT (Non-Medical) qua the General BPL Category.*

II. *Issue a writ of mandamus directing the respondent authorities not to implement annexure P-6 i.e. revised answer key and annexure P-9 i.e. notification/final result for the post of TGT (Non-Medical) qua the General BPL Category*

III. *Issue a writ of mandamus directing the respondent authorities to consider the petitioner for the post of TGT (Non-Medical) against General BPL Category."*

2. The respondent-Commission published advertisement in the newspaper for filling up 292 posts of TGT (Arts) and 107 TGT (Non-Medical) on contract basis. Thereafter, the requisition for filling up 198 more posts of TGT (Arts) and 92 posts of TGT (Non-Medical) was also called. On 11.05.2019, the Commission conducted examination for the post of TGT (Non-Medical), in which the petitioner being eligible, participated in

the screening test. Thereafter, on 13.05.2019, answer key of the questions was uploaded on the official website of the Commission and at the same time, it invited objections/representations against the uploaded answer key, which were to be preferred uptil 21.05.2019. On 18.06.2019, the revised result on the basis of the objections that were submitted by the candidates, was published on the official website of the Commission.

3. It is not in dispute that the petitioner did not represent when the initial key was published on 13.05.2019 and even after the final key answers have been published on 18.06.2019 and yet participated in the written screening test held on 11.05.2019. The result of the selection was declared by the respondents on 05.08.2019, wherein the name of the petitioner could not make grade as he is not selected. It is in this background the petitioner has preferred the instant petition.

4. It is contended by the petitioner that since the revised key answers, more particularly of questions appearing at Serial Nos.2, 10, 111 and 144 were incorrect, therefore, directions need to be passed for correcting those key answers on the basis of material placed on record. According to the petitioner, it is open to the Court in view of the judgment rendered by the Hon'ble Supreme Court titled as ***Richal and others Versus Rajasthan Public Service Commission, (2018) 8 Supreme Court Cases 81.***

5. On the other hand, learned Advocate General assisted by Mr. Vinod Thakur, learned Additional Advocate General, for respondent No.1 and Mr. Angrez Kapoor, learned Standing Counsel for respondent No.2, have vehemently argued that the petitioner having taken a chance without challenging the key answers and being unsuccessful candidate, cannot turn around and assail or lay challenge to the selection.

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

7. As regards the reliance placed by learned counsel for the petitioner upon Richal's case (*supra*), the same is clearly misplaced as the Hon'ble Supreme Court therein had been discussing qua dealing with the scope of judicial review regarding the correctness of the key answers and it was held that the Courts entertain such challenge on a very limited ground and has always given due weightage

to the opinion of the subject experts. The relevant observation is contained in paras 14 to 19, which reads as under:-

"14. The issue which has been canvassed in this batch of appeals relates to correctness of final key answers as uploaded by the Commission after considering objections thereto. The appellants' case is that the treatment of the objections by the Expert Committee was not based on authoritative text books on the subject and several errors crept into the answer key vitiating the merits of the candidates affecting the entire selection. The issue pertaining to scope of judicial review of correctness of key answer had been considered by this Court time and again. This Court had entertained such challenges on very limited ground and has always given due weight to the opinions of subject experts. A three Judge Bench of this Court in Kanpur University, through Vice–Chancellor and others vs. Samir Gupta and others, 1983 (4) SCC 309, had occasion to consider a case where challenge was made to the key answers supplied by the paper–setter with regard to multiple choice of the objective type test for admission in medical courses through combined Pre–Medical Test. The High Court while considering the challenge of the candidates to various key answers accepted the challenge to different questions. With regard to some of the questions the High Court held that the key answer is not the correct answer. This Court repelling the challenge made the following observations in paras 15 and 16: (SCC pp.315-16)

"15. The findings of the High Court raise a question of great importance to the student community. Normally, one would be inclined to the view, especially if one has been a paper–setter and an examiner, that the key answer furnished by the paper–setter and accepted by the University as correct, should not be allowed to be challenged. One way of achieving it is not to publish the key answer at all. If the University had not published the key answer along with the result of the Test, no controversy would have arisen in this case. But that is not a correct way of looking at these matters which involve the future of hundreds of students who are aspirants for admission to professional courses. If the key answer were kept secret in this case, the remedy would have been worse than the disease because, so many students would have had to suffer the injustice in silence. The publication of the key answer has unraveled an unhappy state of affairs to which the University and the State Government must find a solution. Their sense of fairness in publishing the key answer has given them an opportunity to have a closer look at the system of examinations which they conduct. What has failed is not the computer but the human system.

15. Shri Kacker, who appears on behalf of the

University, contended that no challenge should be allowed to be made to the correctness of a key answer unless, on the face of it, it is wrong. We agree that the key answer should be assumed to be correct unless it is proved to be wrong and that it should not be held to be wrong by an inferential process of reasoning or by a process of rationalisation. It must be clearly demonstrated to be wrong, that is to say, it must be such as no reasonable body of men well–versed in the particular subject would regard as correct. The contention of the University is falsified in this case by a large number of acknowledged textbooks, which are commonly read by students in U.P. Those textbooks leave no room for doubt that the answer given by the students is correct and the key answer is incorrect."

16. *Following the above judgment in Kanpur University (supra) this Court in Manish Ujwal and others vs. Maharishi Dayanand Saraswati University and others, 2005(13) SCC 744, reiterated the principle in following words in paragraphs 9 and 10:*

"9. In Kanpur University v. Samir Gupta considering a similar problem, this Court held that there is an assumption about the key answers being correct and in case of doubt, the Court would unquestionably prefer the key answers. It is for this reason that we have not referred to those key answers in respect whereof there is a doubt as a result of difference of opinion between the experts. Regarding the key answers in respect whereof the matter is beyond the realm of doubt, this Court has held that it would be unfair to penalise the students for not giving an answer which accords with the key answer, that is to say, with an answer which is demonstrated to be wrong. There is no dispute about the aforesaid six key answers being demonstrably wrong and this fact has rightly not been questioned by the learned counsel for the University. In this view, students cannot be made to suffer for the fault and negligence of the University.

10. The High Court has committed a serious illegality in coming to the conclusion that it cannot be said with certainty that answers to the six questions given in the key answers were erroneous and incorrect. As already noticed, the key answers are palpably and demonstrably erroneous. In that view of the matter, the student community, whether the appellants or intervenors or even those who did not approach the High Court or this Court, cannot be made to suffer on account of errors committed by the University. For the present, we say no more because there is nothing on record as to how this error crept up in giving the erroneous key answers and who was negligent. At the same time, however, it is necessary to note that the University and those who prepare the key answers have to be very careful and

abundant caution is necessary in these matters for more than one reason. We mention few of those; first and paramount reason being the welfare of the student as a wrong key answer can result in the merit being made a casualty. One can well understand the predicament of a young student at the threshold of his or her career if despite giving correct answer, the student suffers as a result of wrong and demonstrably erroneous key answers; the second reason is that the courts are slow in interfering in educational matters which, in turn, casts a higher responsibility on the University while preparing the key answers; and thirdly, in cases of doubt, the benefit goes in favour of the University and not in favour of the students. If this attitude of casual approach in providing key answers is adopted by the persons concerned, directions may have to be issued for taking appropriate action, including disciplinary action, against those responsible for wrong and demonstrably erroneous key answers, but we refrain from issuing such directions in the present case."

17. To the same effect, this Court in Guru Nank Dev University vs. Saumil Garg and others, 2005(13) SCC 749, had directed the University to revaluate the answers of 8 questions with reference to key answers provided by CBSE. This Court also disapproved the course adopted by the University which has given the marks to all the students who had participated in the entrance test irrespective of whether someone had answered questions or not.

18. Another judgment which is referred to is Rajesh Kumar and others vs. State of Bihar and others, 2013 (4) SCC 690, where this Court had occasion to consider the case pertaining to erroneous evaluation using the wrong answer key. The Bihar Staff Selection Commission invited applications against the posts of Junior Engineer(Civil). Selection process comprised of a written objective type examination. Unsuccessful candidates assailed the selection. Single Judge of the High Court referred the model answer key to experts. Based on the report of the experts, Single Judge held that 41 model answers out of 100 are wrong. The Single Judge held that the entire examination was liable to be cancelled and so also the appointments so made on the basis thereof. The Letters Patent Appeal was filed by certain candidates which was partly allowed by the Division Bench of the High Court. The Division Bench modified the order passed by the Single Judge and declared that the entire examination need not be cancelled. The order of Division Bench was challenged wherein this Court in paragraph 19 has held:

"19. The submissions made by Mr Rao are not without merit. Given the nature of the defect in the answer key the most natural and logical way of correcting the evaluation of the scripts was to correct the key and get the answer scripts re− evaluated on the

basis thereof. There was, in the circumstances, no compelling reason for directing a fresh examination to be held by the Commission especially when there was no allegation about any malpractice, fraud or corrupt motives that could possibly vitiate the earlier examination to call for a fresh attempt by all concerned. The process of re- evaluation of the answer scripts with reference to the correct key will in addition be less expensive apart from being quicker. The process would also not give any unfair advantage to anyone of the candidates on account of the time lag between the examination earlier held and the one that may have been held pursuant to the direction of the High Court. Suffice it to say that the re-evaluation was and is a better option, in the facts and circumstances of the case."

19. *The key answers prepared by the paper-setter or the examining body is presumed to have been prepared after due deliberations. To err is human. There are various factors which may lead to framing of the incorrect key answers. The publication of key answers is a step to achieve transparency and to give an opportunity to candidates to assess the correctness of their answers. An opportunity to file objections against the key answers uploaded by examining body is a step to achieve fairness and perfection in the process. The objections to the key answers are to be examined by the experts and thereafter corrective measures, if any, should be taken by the examining body. In the present case we have noted that after considering the objections final key answers were published by the Commission thereafter several writ petitions were filed challenging the correctness of the key answers adopted by the Commission. The High Court repelled the challenge accepting the views of the experts. The candidates still unsatisfied, have come up in this Court by filing these appeals."*

8. It would be noticed that the Hon'ble Supreme Court, while laying down the scope of judicial review, has held that the Court can in a given case, send the key answers to be examined by experts**,** but then this is not the issue in this case, because admittedly, the petitioner did not file or prefer any objection to the provisional key answers dated11.05.2019 and even thereafter to the final key and having failed to do so, it clearly estopped him from filing the instant petition.

9. In this regard, we need not to multiply authorities. A reference can conveniently be made to the recent judgment of the Hon'ble Supreme Court in ***Anupal Singh and others Versus State of Uttar Pradesh***

through Principal Secretary, Personnel Department and others, (2020) 2 SCC 173.

10. The petitioner after having taken a calculated chance, appeared in the selection process without any demurin the written examination and there was no challenge of the process/key answers now only because the interview is not palatable to him, has filed the instant petition.

11. In such cases, relief is to be declined by applying the principles of estoppel, acquiescences and waivers referred in this regard in two recent judgments. In Anupama's case, it was observed in paras 55, 56, 57, 58 and 59 as under:-

"55. Having participated in the interview, the private respondents cannot challenge the Office Memorandum dated 12-10-2014 and the selection. On behalf of the appellants, it was contended that after the revised Notification dated 12-10-2014, the private respondents participated in the interview without protest and only after the result was announced and finding that they were not selected, the private respondents chose to challenge the revised Notification dated 12-10-2014 and the private respondents are estopped from challenging the selection process. It is a settled law that a person having consciously participated in the interview cannot turn around and challenge the selection process.

56. Observing that the result of the interview cannot be challenged by a candidate who has participated in the interview and has taken chance to get selected at the said interview and ultimately, finds himself to be unsuccessful, in Madan Lal v. State of J&K (1995) 3 SCC 486, it was held as under: (SCC p. 493, para 9

"9. ... The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted."

57. In K.H. Siraj v. High Court of Kerala, (2006) 6 SCC 395, it was held

as under:(SCC p. 426, para 73)

"73. The appellant-petitioners having participated in the interview in this background, it is not open to the appellant- petitioners to turn round thereafter when they failed at the interview and contend that the provision of a minimum mark for the interview was not proper."

58. In Union of India v. S. Vinodh Kumar, (2007) 8 SCC 100, it was held as under:(SCC p. 107, para 19)

"19. In Chandra Prakash Tiwari v. Shakuntala Shukla, (2002) 6 SCC 127… …

It was further observed: (SCC p.149, para 34)

'34. There is thus no doubt that while question of any estoppel by conduct would not arise in the contextual facts but the law seem to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the interview is not "palatable' to him, he cannot turn round and subsequently contend that the process of interview was unfair or there was some lacuna in the process.' "

59. Same principle was reiterated in Sadananda Halo v. Momtaz Ali Sheikh, (2008) 4 SCC 619 wherein, it was held a under: (SCC pp. 645-46, para 59)

"59. It is also a settled position that the unsuccessful candidates cannot turn back and assail the selection process. There are of course the exceptions carved out by this Court to this general rule. This position was reiterated by this Court in its latest judgment in Union of India v. S. Vinodh Kumar, (2007) 8 SCC 100……. The Court also referred to the judgment in Om Prakash Shukla v. Akhilesh Kumar Shukla, 1986 Supp SCC 285, where it has been held specifically that when a candidate appears in the examination without protest and subsequently is found to be not successful in the examination, the question of entertaining the petition challenging such examination would not arise."

12. In addition, a reference can also be made to another judgment in ***Meeta Sahai Versus State of Bihar & Ors., (2019) 17 Scale 718***, wherein while dealing with the contentions regarding the preliminary issue of maintainability of the petition on the ground that the petitioner therein had taken part in the selection process and could not challenge it later due to mere failure in selection, it was observed in paras 16 and 17 as under:-

"16. Furthermore, before beginning analysis of the legal issues involved, it is necessary to first address the preliminary issue. The maintainability of the very challenge by the appellant has been questioned on the ground that she having partaken in the selection process cannot later challenge it due to mere failure in selection. The counsel for respondents relied upon a catena of decisions of this Court to substantiate his objection.

17. It is well settled that the principle of estoppel prevents a candidate from challenging the selection process after having failed in it as iterated by this Court in a plethora of judgments including Manish Kumar Shahi v. State of Bihar, observing as follows:

> "16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the appellant is not entitled to challenge the criteria or process of selection. Surely, if the appellant's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The appellant invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the appellant clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."5 The underlying objective of this principle is to prevent candidates from trying another shot at consideration, and to avoid an impasse wherein every disgruntled candidate, having failed the selection, challenges it in the 4 (2010) 12 SCC 576 5 See also: Madan Lal v. State of J&K [(1995) 3 SCC], Marripati Nagaraja v. State of A.P.[(2007) 11 SCC 522], Dhananjay Malik v. State of Uttaranchal [(2008) 4 SCC 171] and K.A."

It was also clarified that the principle could only apply to the participation in the selection process and not any illegality committed during the selection which is not even the pleaded case or the challenge obtaining in this case.

13. For all the reasons above, we find no merit in this writ petition and the same is dismissed. Interim order is vacated. Pending application(s), if any, also stand disposed of.

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

Pawan Kumar ....Petitioner.

Versus

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

CWPOA No.324 of 2019
Decided on: 29.09.2020

Constitution of India, 1950-Article 14- Twin test for a classification to pass under Article 14- (a) that the classification has to be based on an intelligible differentia (b) the intelligible differentia must have some nexus with the object to be achieved on the basis of said classification.
The Grant-in-Aid is given to those teachers who have been appointed through Parents Teachers Association irrespective of fact whether the appointment is in school located in rural area or urban- Semi urban area- Parent Teacher Associations are appointing teachers in the schools because there are posts lying vacated which the education department has not been able to fill for the reasons which can be best explained by department- when against vacant , parent teachers association has engaged a person to impart education to the students be it in school located in Rural area or in Municipal committees etc of the state the government has to pay grant and same can not be denied on the basis of geographical location or school- The denying grant on the basis of geographical location is discriminatory and violative of article 14 of constitution of India.

For the petitioner : Mr. Neeraj K. Sharma, Advocate.
For the respondents : Mr. Sumesh Raj, Dinesh Thakur and
Mr. Sanjeev Sood, Additional Advocate Generals.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

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

"i) That the notification/letter dated 27 Aug, 2007 (PL) may kindly be quashed and set aside while issuing the writ in the nature of certiorari.

ii) That the respondents may kindly be directed to pay the grant in aid w.e.f. 9.10.2007 with interest and with all consequential benefits".

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

Petitioner was initially appointed as a Lecturer (Commerce) on PTA basis on 09.10.2007 and he is serving as such in the Government Senior Secondary School, Manali, District Kullu, H.P. The grievance of the petitioner is with regard to the Communication dated 27.08.2007 (Annexure P-1), issued by Deputy Secretary (Higher Education) to the Government of Himachal Pradesh, on the subject Non-admissibility of grants to PTAs in Municipal Corporation, Municipal Committees and Nagar Panchayats ares, in terms of which decision stood taken by the Government that Grant-in-Aid to Parent Teachers Associations will not be admissible in respect of the Schools located in the Municipal Corporation, Municipal

Committees and Nagar Panchayats areas of the State. In view of this Communication, the petitioner has not been paid Grant-in-Aid and accordingly, the same stands assailed by him, on the ground of arbitrariness.

3. The petition is contested by the respondents/State, *inter alia*, on the ground that the petitioner was engaged by the Parents Teachers Association concerned within the Municipal Corporation area and in terms of the instructions which stand issued by the State, grants under Grant-in-Aid to Parents Teachers Associations are not admissible in respect of the schools located in the Municipal Corporation, Municipal Committees and Nagar Panchayats areas of the State. As per the State, grants to the teachers of the schools falling in these areas are admissible only to those Parents Teachers Associations, wherein the teachers stood appointed before 27.08.2007 and thereafter, the Parents Teachers Association concerned has to release due and admissible salary to the teachers engaged from its own funds. It is further the stand of the State that Grant-in-Aid to Parents Teachers Associations teachers is payable only to those teachers, who are working outside the Municipal areas of the State where most of the posts are lying vacant and Grant-in-Aid cannot be given to the petitioner, who otherwise is at liberty to approach the Parents Teachers Association for the release of due and admissible salary.

4. In rebuttal, the petitioner has reiterated his claim and denied the submissions made in the reply.

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

6. The moot issue involved in this case is as to whether the act of the respondents/State of restricting grants under the Grant-in-aid to Parents Teachers Associations in respect of the schools located outside the Municipal Corporation, Municipal Committees and Nagar Panchayats areas of the State only and denying the same to the schools located in the Municipal Corporation, Municipal Committees and Nagar Panchayats areas of the State, is legally sustainable or not.

7. Without going in deep, into the functioning of Parents Teachers Associations, suffice it to say that these are the associations which have been created at the school level, which engage persons temporarily against the vacant posts of Teachers/Lecturers in the school concerned for imparting education to the children. The very fact that such like associations do exist in Government Schools of the State, is self-speaking that the Education Department has failed to perform its duty of making available Teachers and Lecturers in the schools of the State by appointing them in accordance with the provisions of the Recruitment and Promotion Rules in force. The things have not stopped here only. Grant-in-Aid Rules have also been framed by

the Government to provide grant to the said Parents Teachers Associations and through them to the Teachers/Lecturers so appointed.

8. As in this writ petition, this Court has not been called upon to adjudicate the legality of the Parents Teachers Associations or the Grant-in-Aid Rules, the Court is not making any further observation in this regard.

9. Article 14 of the Constitution of India permits classification. In order for a classification to pass the test of Article 14, it has to undergo a twin test. This twin test is:- (a) That the classification has to be based on an intelligible differentia and (b) The intelligible differentia must have some nexus with the object to be achieved on the basis of said classification.

10. Coming to the facts of this case, the Government has made a classification between Teachers/Lecturers appointed by Parents Teachers Associations in the schools located in the Municipal Corporation, Municipal Committees and Nagar Panchayats of the State on one hand and Teachers/Lecturers appointed by Parents Teachers Associations in schools not located in such areas on the other hand for the purpose of Grant-in-Aid, post 27.08.2007. As per the State, the intelligible differentia between them is the place where the School is situated, i.e. whether it is situated in the rural areas of the State or the areas which are Urban or Semi-Urban.

11. The justification which has been given by the State in its reply, as to why Grant-in-Aid has been made in admissible in respect of the schools located in the Municipal Corporation, Municipal Committees and Nagar Panchayats of the State is that the teachers are found in abundance in such areas whereas posts of teachers are lying vacant in the Schools in rural areas.

12. In my considered view, this justification which has been given by the State, does not pass the twin test of Article 14 of the Constitution of India to justify denial of Grant-in-Aid to the Schools located in Urban and Semi-Urban areas. This, I say for the reasons that the Grant-in-Aid is given to those teachers who have been appointed through Parents Teachers Associations. Irrespective of the fact whether the appointment is in a School located in rural area or Urban or Semi-Urban area, the fact of the matter is that Parents Teachers Association is appointing Teachers in the schools because there are posts lying vacant which the Education Department has not been able to fill up for the reasons which can be best explained by them. Therefore, when against a vacant post, Parents Teachers Association has engaged a person to impart education to the students, be it in a school located in the Rural area or in the schools located in the Municipal Corporation, Municipal Committees and Nagar Panchayats areas of the State, the Government has to pay grant to them and the same cannot be denied on the basis of

the geographical locations or the School. A Teacher or a Lecturer appointed by Parents Teachers Association imparts education to a student irrespective of the fact whether he is appointed in a school situated in Rural area or not. Grant is paid to the Parents Teachers Association to make good the wages which are to be paid to such appointees.

13. In this view of the matter, by denying Grant to those schools which are situated in the Municipal Corporation, Municipal Committees and Nagar Panchayats areas of the State, the State is discriminating between the Teachers and the Lecturers who have been appointed by the Parents Teachers Associations for imparting education to the students in the absence of regular Teachers/Lecturers manning the post in hand. This act of the State is discriminatory and violative of Article 14 of the Constitution of India and Communication dated 27.08.2007 (Annexure P-1) is thus unconstitutional as it violates Article 14 of the Constitution of India.

14. Accordingly, this writ petition is allowed by quashing the Communication dated 27.08.2007 (Annexure P-1) and by directing the State to release Grant under the Grant-in-Aid to Parents Teachers Associations even to the Schools located in the Municipal Corporation, Municipal Committees and Nagar Panchayats of the State and salary of the petitioner be also paid accordingly with arrears. It is clarified that in case arrears as payable to the petitioner are paid to him within a period of three months from today, then the same shall not entail any interest. However, in case the arrears are not paid within three months as of today, then the same shall entail simple interest at the rate of 6% from the date of filing of the petition, which is disposed of in above terms. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, also stands vacated.

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

Twinkle Pundir & Ors. ...Petitioners

Versus

State of H.P. & Ors. ...Respondents

CWP No. 1679 of 2020
Reserved on : 01.10.2020
Decided on: 06.10.2020

Constitution of India, 1950-Article 226-The petitioners took admission in three years course in GNM i.e, General Nursing & Midwifery diploma- in Himalayan school of Nursing. The petitioners handed over their original documents to college at the time of admission at the instance of college on the pretext that document were required for admission and would be given back as and when required by petitioners - the petitioner approached the college for

return of documents but of no avail, hence the petition for direction to respondents to return the documents and compensation for illegally retaining their documents – As per reply. the document are not in custody of college having been seized by CBI- As per CBI ,college had retained the original documents at the time of admission for ulterior motive and Seized by CBI- CBI has no objection in case original documents were released to petitioners after retaining photocopies and petitioner shall produce originals as and when required- CBI is directed to return the documents – Petitioners are compensated for their legal expenses to the tune of Rs. 50000/- each towards litigation expenses- petitioners are open to claim compensation before appropriate authority or court in accordance with law.

Cases referred:
Maharishi Dayanand University vs. M.L.R. Saraswati College Education, (2000) 7 SCC 746;
Rohit Singhal Vs. Jawahar Navodya Vidyalaya, (2003) 1 SCC 687;
Osmania University Teachers' Association Vs. State of Andhra Pradesh, (1987) 4 SCC 671;
Orissa Vs. Mamata Mohanty (2011) 3 SCC 436;
Tamilnadu and others Vs. K. Shyam Sunder and others, (2011) 8 SCC 737;

For the Petitioners : Mr. Bimal Gupta, Sr. Advocate with Ms. Kusum Chaudhary, Advocate.

For the Respondents : Mr. Ashok Sharma, Advocate General with Mr. Vikas Rathore, Mr. Vinod Thakur, Mr. Shiv Pal Manhans, Addl. A.Gs., Ms. Seema Sharma, Mr. Bhupinder Thakur and Mr. Yudhvir Thakur, Dy. A.Gs., for respondent No. 1.

Mr. Anshul Bansal, Advocate, for respondent No. 2.

Mr. Naveen Awasthi, Advocate, for respondents No. 3 to 5.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

How at times the private educational institutions get down to blackmailing and hand-twisting, is best reflected in the instant case.

2. The petitioners took admission in three years course in GNM i.e. General Nursing & Midwifery Diploma in the Himalayan School of Nursing, being run by the Himalayan Group of Professional Institutions, under the aegis of Maa Saraswati Education Trust, registered in the State of Haryana. At the time of taking admission in the college, the petitioners were asked to hand over their original educational certificates to the college on the pretext that those documents were required for the admission purpose and would be given back as and when required by the petitioners. The petitioners alongwith other students handed over their

original educational certificates to the college authorities of respondent No. 5, believing that the same would be handed over to them as and when required and desired, but alas this was not happened.

3. The petitioners, approached the college authorities for return of the documents from time to time, but of no avail, constraining them to prefer representations to Hon'ble the Chief Minister, with a request to direct the respondents, to return the certificates back but to no avail. Even after appearing in final examination of third year in 2019, the petitioners again approached the Chairman of respondent No. 3, who informed the petitioners that the original documents as retained by college, have now been taken by the Central Bureau of Investigation (for short the "CBI").

4. Having failed to secure and get back their original documents and certificates, the petitioners have filed the instant petition for the grant of following substantive relief(s):-

> i. That respondent No. 2 to 5 may be directed to return the original documents of the petitioners immediately without any further delay.
>
> ii. Respondents No. 2 to 5 or any of these respondents in whose illegal custody the original documents of petitioners are there, may kindly be directed to pay to each of the petitioner a sum of Rupees Five Lacs as compensation. The respondents may further be directed to produce the records and to pay costs.

5. The college authority(ies), who have been arrayed as respondents No. 3 to 5, in their reply, submitted that the documents which were being sought by the petitioners, are not in the custody of the college, as these were seized by the CBI during the verification of allegations in FIR registered against the institutions, who had been receiving scholarship money for SC and ST students. The remaining averments regarding the petitioners having repeatedly approached the college authority for return of the documents have not been specifically denied but have been denied in a routine fashion by averring that the contents of this para are denied being wrong and incorrect.

6. At the time of filing of the petition, the Court did not proceed to issue any notice to second respondent i.e. CBI, however, taking into consideration, the response of the college authority(ies) i.e. respondents No. 3 to 5, the Court issued notice and directed the CBI to file its response.

7. It is apt to reproduce paras 3 to 5 of the reply filed by CBI, which read as under:-

> "3. That during the search proceedings at Himalayan Group of Professional Institutions, Kala Amb, Tehsil Nahan, District Sirmaur, H.P., certain files were seized.

4. That the scrutiny of seized files, revealed that the Himalayan Group of Professional Institutions, Kala Amb, Tehsil Nahan, District Sirmaur, H.P., had retained the original documents of the students, who had taken admission in the above mentioned institutions, with ulterior motives. The documents mentioned herein above, including the original documents of the Petitioners were seized by CBI after obtaining search warrants from the court of learned Special Magistrate (CBI) cum CJM, Shimla. After conclusion of search, CBI preferred an application seeking retention of seized documents for further investigation before the Court of learned Special Magistrate (CBI)-cum-CJM, Shimla. The said application was allowed by the learned Special Magistrate (CBI)-cum-CJM vide order dated 31.05.2019.

5. That since the investigation qua Himalayan Group of Professional Institutions, Kala Amb, Tehsil Nahan, District Sirmaur, H.P., is at an advanced stage, thus CBI has no objection in case the original documents are returned back to the students and photocopies thereof are retained by CBI subject to the condition that the students shall produce the original documents before the competent Court, as well as CBI, as and when required. It is in the interest of justice that the students approach the office of CBI for collecting their original documents."

8. In State of ***Tamilnadu and others Vs. K. Shyam Sunder and others, (2011) 8 SCC 737***, the Hon'ble Supreme Court explained the importance of education in the following terms:-

"18. In the post - Constitutional era, an attempt has been made to create an egalitarian society removing disparity amongst individuals, and in order to achieve that purpose, education is one of the most important and effective means. After independence, there has been an earnest effort to bring education out of commercialism/mercantilism. In the year 1951, the Secondary School Commission was constituted as per the recommendation of Central Advisory Board of Education and an idea was mooted by the Government to prepare textbooks and a common syllabus in education for all students. In 1964 - 1966, the report on National Education Policy was submitted by the Kothari Commission providing for common schools suggesting that public funded schools be opened for all children irrespective of caste, creed, community, religion, economic conditions or social status. Quality of education imparted to a child should not depend on wealth or class. Tuition fee should not be charged from any child, as it would meet the expectations of parents with average income and they would be able to send their children to such schools. The recommendations by the Kothari Commission were accepted and reiterated by the Yashpal Committee in the year 1991. It was in this backdrop that in Tamil Nadu, there has been a demand from the public at large to bring about a common education system for all children."

9. In State of ***Orissa Vs. Mamata Mohanty (2011) 3 SCC 436***, the Hon'ble Supreme Court emphasized the importance of education by observing that education connotes the whole course of scholastic instruction which a person has received. Education connotes the process of training and developing the knowledge, skill, mind and character of students by formal schooling.

10. In ***Osmania University Teachers' Association Vs. State of Andhra Pradesh, (1987) 4 SCC 671***, it was held that democracy depends for its very life on a high standard of general, vocational and professional education. Dissemination of learning with search for new knowledge with discipline all round must be maintained at all costs.

11. Education is an investment made by the nation in its children for harvesting future crop of responsible adults productive of a well-functioning society (***Refer Rohit Singhal Vs. Jawahar Navodya Vidyalaya, (2003) 1 SCC 687***).

12. But what happens when educator gets down to hand twisting and black mailing by retaining the original certificates and other documents of its students so as to ensure that their wings are clipped and they do not migrate to any other college or for that matter leave the college.

13. It has specifically come out in the reply filed by CBI that the respondents-college had retained the original documents of the students who had taken admission in the above mentioned institutions with ulterior motive.

14. Now, that the CBI has no objection in case the original documents are returned back to the students and photocopies thereof retained by the CBI. The prayer No. 1 is allowed by directing the CBI to return the original documents back to the students after retaining photocopies thereof, subject to the condition that the petitioners and other students shall produce the original documents before the competent Court as well as CBI, as and when required.

15. As regards the second prayer, it has been duly established on record that on account of illegal action of the college management the petitioners and other similarly situate students have been put to untold miserly and tension exposing their careers to unpredictable uncertainty. Not only this, the petitioners and similarly situate students have been compelled to undergo lot of mental trauma and indulge in a legal battle to set right their upset careers.

16. Therefore, in such circumstances the prayer of the petitioners has to be considered in light of the following observations of the Hon'ble Supreme Court in ***Maharishi Dayanand University vs. M.L.R. Saraswati College Education, (2000) 7 SCC 746:-***

> "39. It is time that the courts evolve a mechanism for awarding damages to the students whose careers are seriously jeopardised by unscrupulous management

of colleges/schools which indulge in violation of all rules. This is not the occasion to go deep into that aspect but one day it has to be done."

17. At this stage, the learned counsel for the college would try to argue that the college management is not at all at fault, however, after taking into consideration the entirety of the facts and circumstances of the case, as enumerated above, this cannot be a valid contention on the part of the management to exculpate itself from legal accountability to the students who are harmed by its actions.

18. Therefore, taking into consideration, the entirety of the facts and circumstances of the case, we feel that the petitioners have to be compensated for the legal expenses, at least, which have been incurred by them in prosecuting the litigation before this Court.

19. We, accordingly, while allowing relief No. 2, direct the respondents-college to pay a sum of Rs. 50,000/- each to the petitioners towards litigation expenses. As regards award of compensation, the same has to be awarded on the basis of evidence. Therefore, we leave it open to the petitioners to claim the same before an appropriate authority/Court etc. in accordance with law.

20. With these observations, the writ petition is disposed of, so also pending miscellaneous application(s), if any, leaving the parties to bear their own costs.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J & HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Mamta Devi .....Petitioner.

Versus

State of Himachal Pradesh & others .....Respondents.

CWP No. 3100 of 2020
Reserved on: 06.10.2020
Decided on: 28.10.2020

Constitution of India, 1950- Article 226-The petitioner challenged the policy which debars the petitioner being married daughter of deceased government employee from seeking appointment on compassionate ground- The legality of the compassionate policy in vogue has to be evaluated on the touch stone of constitutionally- Policy is discriminatory to married daughter against spirit of article 15 of constitution of India- The state can not act in a misogynistic way ,carving ways to debar compassionate employment to married daughters and such acts fall within definition of discrimination based on sex which is against article 15 of constitution of India.

Cases referred:

Union of India vs. Shashank Goswami and another, AIR 2012 SC 2294,
Smt. Vimla Srivastava and others (2016(1) ADJ 21 (DB),

For the petitioner: Mr. Maan Singh, Advocate.

For the respondents: Mr. Hemant Vaid and Mr. Hemanshu Mishra, Additional Advocates General, with Mr. J.S. Guleria, Deputy Advocate General

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The petitioner, by way of the extant writ petition, is seeking the following substantive reliefs:

> *"(i) That the Policy, Annexure P-6 may be quashed and set aside more specifically clause (2) which debars the petitioner being a married daughter of deceased Government employee from seeking appointment on compassionate grounds and respondents may be directed to modify/amend the policy by including married daughters in the categories of eligible persons for the purpose.*
>
> *(ii) That annexures P-4 and P-5 dated 22.06.2020 and 09.07.2020, respectively be quashed and set aside.*
>
> *(iii) That after striking down the aforesaid clause, respondents may be directed to consider the case of the petitioner for appointment on compassionate grounds to a post befitting her qualification (M.A. Hindi and diploma in computers) at the earliest.*

2. Succinctly, the facts, emanating from the extant writ petition, are that on 08.05.2019, Shri Thakur Dass, father of the petitioner, who was a Class IV employee in the office of District Ayurvedic Office, Kullu, died in harness. It is further contended that the petitioner, her sister and mother are the survivors of Shri Thakur Dass and there is no male member in their family. As per the petitioner, she, her mother and sister, were dependant on late Shri Thakur Dass, and her mother and sister are unwilling to opt employment. The petitioner, who is M.A. (Hindi) and has diploma in Computers, applied on compassionate grounds and application for compassionate appointment was duly supported with the affidavits of her mother and sister purveying their 'No Objection'. Total annual family income of the petitioner's family is Rs. 63,000/- and to this effect the petitioner has annexed latest income certificate issued by the competent authority. It is averred that as per the Policy for providing Compassionate Employment, which is in vogue, ceiling of family income is Rs. 2,25,000/- for a family of four members, thus the income of the family of the petitioner is well under the ceiling.

It is further averred that on 22.06.2020, application of the petitioner was rejected on the anvil that *"there is no provision in the Policy for grant of employment assistance to married daughter of the deceased Government employee."*

3. The petitioner, concisely, is seeking a direction of this Court to quash clause (2) of the above policy, which is extracted hereunder for ready reference, being discriminatory and unconstitutional:

> ***"(2) To whom the Policy is applicable:- the employment assistance on compassionate grounds will be allowed in order of priority only to widow or a son or an unmarried daughter (in case of unmarried Govt. Servant, to father, mother, brother and unmarried sister) of:-***
>
> ***(a) A regular Government employee/Contractual employee, who dies while in services (including suicide), leaving his family indigent & in immediate need of assistance;***
>
> ***(b) A Daily wages worker, who dies while in service, leaving his/her family indigent & in immediate need of assistance:***
>
> ***... ... ..."***

4. The case of the petitioner is that the above provision of the policy has no rationale for debarring married daughter(s) from compassionate employment. As per the petitioner, son of an employee, who dies in harness, remains son throughout his life, and likewise daughter remains daughter, being married or unmarried. Therefore, debarring a married daughter seeking employment assistance solely on the ground that she is married is unjust. It is averred that the policy is discriminatory and against the essence of Constitution of India, as it creates gender inequality. As per the petitioner, she is declared ineligible for being considered for employment assistance only for the reason that she is female and married.

5. On the above grounds, the petitioner is seeking directions of this Court to struck down Clause (2) of the policy and also quash Annexures P-4 and P-5, whereby the case of the petitioner for employment assistance was not considered and virtually rejected. Lastly, the petitioner has also sought a relief that the respondents be directed to consider the petitioner for appointment on compassionate grounds.

6. Conversely, the respondents, by way of filing an extensive and detailed reply to the extant petition, resisted and denied the claim of the petitioner. Precisely, as per the respondents, the petitioner is ineligible for appointment on compassionate grounds, as the policy is only applicable to the dependents of the deceased Government employee, i.e., to the unmarried daughter (in case of unmarried Govt. employee) to father, mother, brother and unmarried sister. It is further averred in the reply that the petitioner is married to one Shri

Sohan Lal, therefore, she is not to be counted as dependent of the deceased government employee. As per the respondents, elements of the policy of compassionate appointment are not only based on financial circumstances, but also on social circumstances. In case, married daughters are granted benefit of employment, family living in harness will be deprived of much needed assistance. Lastly, it is prayed that the extant writ petition, being devoid of merits, be dismissed.

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

8. The learned counsel for the petitioner has argued that the clause (2) of the Policy for Providing Compassionate Employment, which is in vogue, is discriminatory, as the same perpetuates arbitrariness and inequality. He has further argued that the classification of married daughters of the employees, who die in harness, cannot be termed as reasonable classification, whereupon married daughters are being deprived consideration and consequent thereto employment on compassionate basis. A married daughter cannot be discriminated merely because she is married, whereas no such rigor is applicable to a married son. Marriage alone cannot constitute a ground for discrimination and constitutionally State cannot be allowed to use this assumption of marriage, being a rationale for hostile discrimination denying benefits to a married daughter, especially in the wake of the fact that equal benefits are being extended to a son, whether married or unmarried. He has argued that clause (2) of the policy needs to be struck down as violative of the Constitution of India. If an unmarried daughter, after getting employment, on compassionate ground, has liberty to marry, then it is meaningless that as to why a married daughter, who seeks such employment, is declared ineligible on the basis of the fact that she is married. In the above backdrop, he prays that the extant writ petition be allowed and apt directions be made to the respondents. The learned counsel for the petitioner has drawn our attention to the following judicial pronouncements:

1. ***Vijaya Ukarda Athor (Athawale) vs. State of Maharashtra and others, Civil Appeals No. 409 and 410 of 2015, decided by Hon'ble Supreme Court on 14.01.2015,***

2. ***Smt. Vimla Srivastava and others (2016(1) ADJ 21 (DB), decided by Allahabad High Court;***

3. ***N. Uma vs. The Director of Elementary School Education & others, Writ Petition No. 25366 of 2008, decided on 22.09.2017 by Hon'ble High Court of Judicature at Madras,***

4. ***Udham Singh Nagar District Cooperative Bank Ltd. & another vs. Anjula Singh and others, alongwith batch matters, Special Appeal No 187 of 2017, decided on 25.03.2019 by High Court of Uttarakhand at Nainital; &***

5. ***Court on its own motion vs. State of H.P. & others, CWPIL No. 114 of 2017, decided on 14.08.2018, by High Court of Himachal Pradesh.***

9. Conversely, the learned Additional Advocate General has argued that the policy, in vogue, does not discriminate married daughters and the solitary object and rationale behind the same is that married daughters are no more dependent on the employee died in harness. He has further argued that in case a married daughter is extended benefit under the policy, then the family living in harness would be deprived of much needed employment assistance, as envisaged under the policy. The petitioner, in the case in hand, is married to one Shri Sohan Lal and thus no more dependent on the employee died in harness. Lastly, he has prayed for dismissal of the instant petition. He has relied upon a judgment of Hon'ble Supreme Court rendered in ***Union of India vs. Shashank Goswami and another, AIR 2012 SC 2294,*** wherein the Hon'ble Supreme Court observed: *Compassionate appointment cannot be claimed as a matter of right. It is not another source of recruitment. In such cases, the claim has to be considered in accordance with rules, regulations or administrative instructions, taking into consideration financial conditions of the family of the deceased.*

10. At the very outset, it would be profitable to examine and analyze the above judgments cited, vis-a-vis, the facts of the present case. After going through the judgment of Hon'ble Supreme Court, rendered in case ***Vijaya Ukarda Athor*** (supra), we are of the opinion that there is no similarity of facts amongst the present case and the judgment referred to above, so the same is of no avail to the petitioner.

11. In a decision rendered by Hon'ble High Court of Allahabad in ***Smt. Vimla Srivastava and others (2016(1) ADJ 21 (DB),*** it has been observed as under:

> ***"The issue before the Court is whether marriage is a social circumstance which is relevant in defining the ambit of the expression "family" and whether the fact that a daughter is married can constitutionally be a permissible ground to deny her the benefit of compassionate appointment. The matter can be looked at from a variety of perspectives. Implicit in the definition which has been adopted by the state in Rule 2 (c) is an assumption that while a son continues to be a member of the family and that upon marriage, he does***

not cease to be a part of the family of his father, a daughter upon marriage ceases to be a part of the family of her father. It is discriminatory and constitutionally impermissible for the State to make that assumption and to use marriage as a rationale for practicing an act of hostile discrimination by denying benefits to a daughter when equivalent benefits are granted to a son in terms of the compassionate appointment. Marriage does not determine the continuance of the relationship of a child, whether a son or a daughter, with the parents. A son continues to be a son both before and after marriage. A daughter continues to a daughter. This relationship is not effaced either in fact or in law upon marriage. Marriage does not bring about a severance of the relationship between, a father and mother and their son or between parents and their daughter. These relationship are not governed or defined by marital status. The state has based its defence in its reply and the foundation of the exclusion on a paternalistic notion of the role and status of a woman. These patriarchal notions must answer the test of the guarantee of equality under Article 14 and must be held answerable to the recognition of gender identity under Article 15.

The stand which has been taken by the state in the counter affidavit proceeds on a paternalistic notion of the position of a woman in our society and particularly of the position of a daughter after marriage. The affidavit postulates that after marriage, a daughter becomes a member of the family of her husband and the responsibility of her maintenance solely lies upon her husband. The second basis which has been indicated in the affidavit is that in Hindu Law, a married daughter cannot be considered as dependent of her father or a dependent of a joint Hindu Family. The assumption that after marriage, a daughter cannot be said to be a member of the family of her father or that she ceases to be dependent on her father irrespective of social circumstances cannot be countenanced. Our society is governed by constitutional principles. Marriage cannot be regarded as a justifiable ground to define and exclude from who constitutes a member of the family when the state has adopted a social welfare policy which is grounded on dependency. The test in matter of compassionate appointment is a test of dependency

with defined relationships There are situations where a son of the deceased government servant may not be in need of compassionate appointment because the economic and financial position of the family of the deceased are not such as to require the grant of compassionate appointment on a preferential basis. But the dependency or a lack of dependency is a matter which is not determined a priori on the basis of whether or not the son is married. Similarly, whether or not a daughter of a deceased should be granted compassionate appointment has to be defined with reference to whether, on a consideration of all relevant facts and circumstances, she was dependent on the deceased government servant. Excluding daughters purely on the ground of marriage would constitute and impermissible discrimination and be violative of Articles 14 and 15 of the Constitution.

A variety of situations can be envisaged where the application of the rule would be invidious and discriminatory. The deceased government servant may have only surviving married daughters to look after the widowed parent- father or mother. The daughters may be the only persons to look after a family in distress after the death of the bread earner. Yet, under the rule no daughter can seek compassionate appointment only because she is married. The family of the deceased employee will not be able to tide over the financial crisis from the untimely death of its wage earner who has died in harness. The purpose and spirit underlying the grant of compassionate appointment stands defeated. In a given situation, even though the deceased government employee leaves behind a surviving son, he may not in fact be looking after the welfare of the surviving parents. Only a daughter may be the source of solace emotional and financial, in certain cases. These are not isolated situations but social realities in India. A surviving son may have left the village, town or state in search of employment in a metropolitan city. The daughter may be the one to care for surviving parent. Yet the rule deprives the daughter of compassionate appointment only because she is married. Our law must evolve in a robust manner to accommodate social contexts. The grant of compassionate appointment is not just a social welfare benefit which is allowed to the person who is granted employment. The purpose of the

> ***benefit is to enable the family of a deceased government servant, who dies in harness, to be supported by the grant of the compassionate appointment to a member of the family. Excluding a married daughter from the ambit of the family may well defeat the object of the social welfare benefit.***
>
> ***... ... ...***
>
> ***Dealing with the aspect of marriage, the Division Bench held as follows:***
>
> ***"Marriage does not have and should not have a proximate nexus with identity. The identity of a woman as a woman continues to subsist even after and notwithstanding her marital relationship. The time has, therefore, come for the Court to affirmatively emphasis that it is not open to the State, if it has to act in conformity with the fundamental principle of equality which is embodied in Articles 14 and 15 of the Constitution, to discriminate against married daughters, by depriving them of the benefit of a horizontal reservation, which is made available to a son irrespective of his marital status.""***

True it is that under the Constitution of India it is impermissible for State to draw any assumption to use marriage as a rationale for practicing an act of hostile discrimination by denying benefit(s) to a daughter, when equivalent benefits are being granted to a son in terms of compassionate appointment. Marriage neither alters the relationship between the married daughters with her parents, nor creates severance of relationship. A son remains a son and his marriage does not alter or severe his relation with his parents, likewise, a daughter is always a daughter to her parents, her marriage also does not alter or severe her relation with her parents. If, the State even draws a thin line of distinction based on gender, then that line has to withstand the test of Article 15 of the Constitution of India, which prohibits discrimination on the basis of religion, race, caste, sex or place of birth. In the instant case, the classificatory distinction, as drawn by the respondents, debarring the married daughter is, could not withstand the test of Article 15 of the Constitution of India.

12. Another point, which we need to delve on, is whether with the marriage of a daughter, her dependency on her parents ceases or it remains unaffected? The daughters have all the rights, which are available to sons, be it succession, right(s) in property etc. and these rights don't cease with marriage of a daughter and remain alive even after marriage. In fact,

marriage is a social circumstance and it does not affect the dependency, thus marriage cannot be regarded as a reasonable and acceptable ground to determine dependency. For dependency (herein financial dependency), many facets have to be looked into, one of them is a situation where a son is not in need of compassionate appointment, but a married daughter is in need of the same, then the State cannot shrug off from its responsibility, rather duty, to provide compassionate appointment to her and the State cannot turn its back to a daughter, on unacceptable ground that she is married, who looks towards the State with the eyes of hope.

13. In nitty-gritty, the judgment (supra) is fully applicable to the facts of the present case and this Court cannot ignore the ratio laid down in the said judgment in adjudicating the present matter, when mother is dependent upon the married daughter.

14. The Madras High Court in ***N. Uma vs. The Director of Elementary School Education & others, Writ Petition No. 25366 of 2008, decided on 22.09.2017,*** has observed as under:

> ***"13. All the above judgments have clearly observed that the State Government should not discriminate inspite of giving compassionate appointment to the sons and daughters of the deceased employee. When the Government is giving appointment to the married sons, they should not deny to give employment to the married daughters. But in this case, only on the ground of marriage of this petitioner, who is the daughter of the deceased mother, is denied by citing marriage as a reason and such action of the State is against the very scheme of the Constitution. The preamble of the constitution ensures equality of status and opportunity to all its citizens. The Government should not discriminate or deprive to woman on the ground of marriage, while the same is not a restriction in the case of a man.***
>
> ***14. Admittedly, in this case, the deceased employee has died during the course of the employment by leaving her two daughters viz., M.Manjula and M.Indra. Infact, the elder daughter of the deceased employee by viz., M.Manjula is a mentally retarded person and this petitioner, who is the second daughter of the deceased employee should take care of the first daughter. But, without considering all the above Government Orders and the judgments of this Court passed in the above writ petitions and the pathetic condition of the petitioner's family, the respondent mechanically passed the present impugned order by stating that the***

petitioner is a married woman and hence she is not entitled to the compassionate appointment. Again, the view of the respondent is totally illegal and he had not applied his mind. In all the above judgments cited supra, this Court directed the Government Authorities to give employment to the married daughter without discrimination but this respondent purposely rejected the request of the petitioner on the sole ground that she is a married daughter of the deceased employee.

... ...

15. ***In fact, this Court in the case of R.Govindammal Vs.Principal Secretary, Social Welfare and Nutritious Meal Programme Department, Chennai in 2015 (5) CTC 344 has directed the first respondent to provide compassionate appointment to the petitioner, is she is otherwise eligible, without reference to marriage. In the said order, the learned Judge of this Court issued a direction to the Chief Secretary of the Tamil Nadu Government, to suitably modify the Government Order in G.O.Ms.No.165, Labour and Employment Department, dated 30.08.2010 in the light of the observations made above.***

16. ***The learned Additional Government Pleader, for the respondent Mr.R.Vijayakumar, argued that the impugned order dated NIL was passed in accordance with the above Government Orders. Since, the Government Order is restricted to give employment to the married daughters and hence, he sustained the impugned order***

17. ***In my considered opinion and by going through the above judgments and on perusing the impugned order passed by the respondent it is unfortunate to note here that the respondent without considering the pathetic situation of the petitioner's case that the elder sister viz., M.Manjula, is a mentally retarded person and she ought to have been taken care of by her family members, the respondent has passed the impugned order in a mechanical manner without mentioning any other ground except the ground of married daughter. All the above cases cited supra has rightly directed the respondent authorities to provide compassionate appointment without reference to the marriage of the petitioner. In the present case also, the above judgment is squarely applicable." (emphasis supplied)***

18. ***The above said decisions apply on all fours to the case***

on hand. In the instant case, the deceased Government servant has no male issue. If the other legal heirs have given no objection to the petitioner being granted appointment on compassionate grounds, it cannot be stated that the petitioner is not entitled to appointment merely because she is married. That apart, Maintenance and Welfare of Parents and Senior Citizens Act places equal responsibility on both the son and daughter to take care of their parents.

19. There can be no artificial classification between married son and married daughter only on the basis of sex, as the same would tantamount to gender discrimination. If married son is considered to be a part of the family, this Court is at a loss to understand as to why a married daughter should not be included in the definition of family.

20. Son and daughter are supposed to take care of the parents at the old age. The married son is to be treated at part with the unmarried daughter. No considering the married daughter for compassionate appointment merely on the basis of marriage is patently arbitrary and unreasonable.

21. For the foregoing reasons, this writ petition is allowed and the impugned order dated 14.9.2008 passed by the second respondent is set aside and the second respondent is directed to consider the application of the petitioner and provide appointment to her on compassionate grounds, if she is otherwise eligible, without reference to her marriage. Such exercise shall be undertaken within a period of four weeks from the date of receipt of a copy of this order."

The epitome of the above judgment and extracted excerpts, are decisive in adjudicating the *lis* in hand and this Court cannot proceed in an opposite direction from that of the judgment (supra). The State, under the scheme of Constitution of India, cannot carve out a way, debarring married daughter(s) from compassionate employment and by doing so the State itself violates the scheme and spirit of the Constitution of India. The mere fact that a daughter is married cannot completely curtail her valuable right of compassionate appointment to bring the family out of harness, especially when son, irrespective of the fact that he is married or unmarried, is eligible for compassionate appointment. Thus, after the death of the parents, the children cannot be treated differently or discriminated on the basis of their sex, as in the present case married daughter is to maintain the mother. There can be no artificial classification between married son and married daughter only on the basis of sex, as it would be equivalent to gender

discrimination, which is specifically prohibited under the Constitution of India, we fully agree with the ratio laid down in the judgment (supra), hence the same is applicable to the facts of the extant case.

15. The Hon'ble High Court of Uttarkhand, in its Full Bench judgment rendered in ***Udham Singh Nagar District Cooperative Bank Ltd. & another vs. Anjula Singh and others,*** held that non-inclusion of a "married daughter" in the definition of a "family", under rule 2(c) of the 1974 Rules and the note below Regulation 104 of the 1975 Regulations, thereby denying her the opportunity of being considered for compassionate appointment, even though she was dependent on the Government servant at the time of his death, is discriminatory and is in violation of Articles 14, 15 and 16 in Part III of the Constitution of India. Resultantly, a "married daughter" was also held to fall within the inclusive definition of "family" of the deceased Government servant, for the purpose of being provided compassionate appointment under the 1974 Rules and the 1975 Regulations. Thus, the judgment (supra) is fully applicable to the present case.

16. Lastly, the learned Counsel for the petitioner has placed reliance on a judgment of this High Court rendered in ***Court on its own motion vs. State of H.P. & others, CWPIL No. 114 of 2017, decided on 14.08.2018.*** Though the facts of the judgment (supra) are not akin, yet the spirit of the judgment is applicable to the instant case, as it conveys that the State cannot discriminate on the ground of gender, while giving benefit of reservation only to the married sons and not the married daughters, being wards of the Freedom Fighters.

17. The conjunctional reading of the above judgments, viz-a-viz, the facts of the instant case, extensively convinces us that the State cannot carve out or draw, even a thin line, separating married daughter(s) from unmarried daughter(s)/son(s)/married son(s), ultimately depriving married daughter(s) of their valuable right of compassionate appointment. The State cannot discriminate married daughter(s) on the mere fact of marriage. The policy of providing compassionate employment, which is in vogue, evidently provide a criterion of dependency on the deceased government servant, now, it is difficult to understand that married sons remain dependent and dependency of married daughters ceases with marriage, hence forming an exception. This exception may have hypothetical rationale, which though not offered, behind depriving employment assistance to a married daughter and it can be twin-fold, viz., (i) with marriage, financial dependency of a female shifts from her parents to her husband and his family; and (ii) least or no expectation from a married daughter to look after her surviving mother/father and siblings, who have chosen to give *'No objection'* in favour of a married daughter, for her's being given employment on compassionate grounds. The above two rationale, in fact, fail to constitute a valid and viable basis depriving employment on

compassionate grounds to married daughters, especially when daughters, married or unmarried, have been given all legal rights, as available to sons (married/unmarried), after the death of parents. So, the real test of "dependency" is the fact that the applicant, seeking compassionate appointment, was dependent on him/her prior to his/her demise. Thus, any other condition(s), debarring married daughter(s) is not only against the scheme of Constitution of India, but also against the dependency test.

18. The legality of the compassionate policy, in vogue, and in question herein, has to be evaluated on the touchstone of its constitutionality, but the policy, upon its evaluation, is discriminatory to married daughters, hence against the spirit of Article 15 of the Constitution of India. The State cannot act in a misogynistic way, carving ways to debar compassionate employment to married daughters and such act(s) fall within the definition of discrimination based on sex, which is against Article 15 of the Constitution of India.

19. The object of compassionate employment is not only social welfare, but also to support the family of the deceased government servant, who dies in harness, and by excluding married daughter(s) from the sweep of the family, the real purpose of social purpose cannot be achieved. If the marital status of a son does not make any difference in the eyes of law, then it is difficult to think, how marital status of a daughter makes such a huge difference in her eligibility. In fact, marriage does not have proximate nexus with identity and even after marriage, a daughter continues to be a daughter. Therefore, if a married son has right to compassionate appointment, then a married daughter also stands on the same footing and her exclusion does not have any plausible basis or logic, so her exclusion has no justifiable criteria.

20. Moreover, in the instant case there is no male member in the family, since the father of the petitioner, who died in harness, left behind his widow and two daughters only, the petitioner, being the elder daughter. The aim and object of the policy for compassionate appointment is to provide financial assistance to the family of the deceased employee. In the absence of any male child in the family, the State cannot shut its eyes and act arbitrarily towards the family, which may also be facing financial constraints after the death of their sole bread earner.

21. As held above, the object of compassionate appointment is not only social welfare, but also to support the family of the deceased government servant, so, the State, being a welfare State, should extend its hands to lift a family from penury and not to turn its back to married daughters, rather pushing them to penury. In case the State deprives compassionate appointment to a married daughter, who, after the death of the deceased employee, has to look after surviving family members, only for the reason that she is married, then the whole object of the policy is vitiated.

22. After incisive deliberations, it emerges that core purpose of compassionate appointment is to save a family from financial vacuum, created after the death of deceased employee. This financial vacuum could be filled up by providing compassionate appointment to the petitioner, who is to look after the survivors of her deceased father and she cannot be deprived compassionate appointment merely on the ground that she is a married daughter, more particularly when there is no male child in the family and the petitioner is having '*No Objection Certificates'* from her mother and younger sister, the only members in the family.

23. In the instant case, in case the petitioner is not given compassionate appointment, who has to take care of her widowed mother and sister, if she is otherwise eligible and she fulfils the apt criteria, the whole family will be pushed to impoverishment, vitiating the real aim of the compassionate employment policy.

24. Therefore, this Court is of the considered view that in the instant case, the compassionate employment policy requires a generous application, keeping in view the peculiar facts and circumstances viz., the deceased employee has left behind his widow and two daughters; the petitioner being the elder daughter, has to look-after her widowed mother and sister, coupled with the fact that they have given their *'No Objection Certificates'* in favour of the petitioner.

25. So, in view of the foregoing discussion, the object of the compassionate employment policy would only be met in case the petitioner is given compassionate appointment, if she otherwise fulfills other required eligibility criteria under the policy for compassionate appointment to the dependents of the deceased employee.

26. In view of foregoing discussion and considering the relevant law on the subject, the extant writ petition is allowed, directing the respondents to give compassionate employment to the petitioner, if she is otherwise eligible and fulfills the criteria prescribed in the apt compassionate employment policy.

27. The writ petition is disposed of in the above terms. All pending application(s) shall also stand(s) disposed of.

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

Preeti Devi .....Petitioner.

Versus

State of Himachal Pradesh and others

.....Respondents.

CWP No.3287 of 2020.
Date of decision: 15.10.2020.

Code of Criminal Procedure, 1973-The petition-seeking direction to state to ensure proper investigation, to lodge F I R under the relevant provisions of I P C relating to the outraging of the modesty and chasity of a woman, sexual assault on a woman, disrobing a woman ,attempt to commit rape on a woman alongwith offences as prescribed in Scheduled castes and scheduled tribes[prevention of atrocities] Act
It is by now well settled that if a person has grievance that FIR has not been registered by the police or having been registered, proper investigation has not been done, then the remedy of the aggrieved person is not to come to the High Court under Article 226 of the Constitution of India, but to approach the Magistrate concerned under Section 156(3) Cr.P.C.

Cases referred:
Sakiri Vasu vs. State of Uttar Pradesh and others (2008) 2 SCC 409;
Sudhir Bhaskarrao Tambe vs. Hemant Yashwant Dhage and others (2016) 6 SCC 277;
M.Subramaniam and another vs. S.Janaki and another (2020) 2 RCR (Criminal) 788;
T.C. Thangaraj vs. V.Engammal and others (2011) 12 SCC 328;

For the Petitioner : Mr. Prashant Chaudhary, 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 Singh Thakur, Deputy Advocate Generals.

ASI Inderjeet, 1st IRBn, Bangarh, District Una, H.P. present in person.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

The instant petition seeks a direction to the respondents-State to ensure proper investigation whereby they be directed to lodge FIR in the present matter under the relevant provisions envisaged in the Indian Penal Code relating to the outraging of the modesty and chastity of a woman, sexual assault on a woman, disrobing a woman, attempt to commit rape on a woman etc. along with the offences as provided under Section 3 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 i.e. commission of atrocities by a member of Non-Scheduled Caste on any person belonging to Scheduled Caste by way of causing injury, insult or annoyance, forcibly removing clothes, assault or using force with intent to dishonour or outraging modesty of a Scheduled Caste person etc.

2. It is by now well settled that if a person has grievance that FIR has not been registered by the police or having been registered, proper investigation has not been done, then

the remedy of the aggrieved person is not to come to the High Court under Article 226 of the Constitution of India, but to approach the Magistrate concerned under Section 156(3) Cr.P.C.

3. This was so held by the Hon'ble Supreme Court in ***Sakiri Vasu*** *vs.* ***State of Uttar Pradesh and others (2008) 2 SCC 409*** which judgment was followed by two Hon'ble Judges Bench of the Hon'ble Supreme Court in ***Sudhir Bhaskarrao Tambe*** *vs.* ***Hemant Yashwant Dhage and others (2016) 6 SCC 277*** and both these judgments in turn have now been followed by three Hon'ble Judges Bench in ***M.Subramaniam and another*** *vs.* ***S.Janaki and another (2020) 2 RCR (Criminal) 788*** wherein it has been observed as under:

> *"5. While it is not possible to accept the contention of the appellants on the question of locus standi, we are inclined to accept the contention that the High Court could not have directed the registration of an FIR with a direction to the police to investigate and file the final report in view of the judgment of this Court in Sakiri Vasu v. State of Uttar Pradesh and Others (2008) 2 SCC 409 in which it has been inter alia held as under:*
>
> > ***"11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 CrPC, then he can approach the Superintendent of Police under Section 154(3) CrPC by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156(3) CrPC before the learned Magistrate concerned. If such an application under Section 156(3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.***
> >
> > ***12. Thus in Mohd. Yousuf v. Afaq Jahan (2006) 1 SCC 627 this Court observed: (SCC p. 631, para 11)***
> >
> > > ***"11. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing***

> ***investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."***

13. The same view was taken by this Court in Dilawar Singh v. State of Delhi (2007) 12 SCC 641: JT (2007) 10 SC 585 (JT vide para 17). We would further clarify that even if an FIR has been registered and even if the police has made the investigation, or is actually making the investigation, which the aggrieved person feels is not proper, such a person can approach the Magistrate under Section 156(3) CrPC, and if the Magistrate is satisfied he can order a proper investigation and take other suitable steps and pass such order(s) as he thinks necessary for ensuring a proper investigation. All these powers a Magistrate enjoys under Section 156(3) CrPC.

14. Section 156(3) states:

> ***"156. (3) Any Magistrate empowered under Section 190 may order such an investigation as abovementioned."***
>
> ***The words "as abovementioned" obviously refer to Section 156(1), which contemplates investigation by the officer in charge of the police station.***

15. Section 156(3) provides for a check by the Magistrate on the police performing its duties under Chapter XII CrPC. In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same.

16. The power in the Magistrate to order further investigation under Section 156(3) is an independent power and does not affect the power of the investigating officer to further investigate the case even after submission of his report vide Section 173(8). Hence the Magistrate can order reopening of the investigation even after the police submits the final report, vide State of Bihar v. J.A.C. Saldanha (1980) 1 SCC 554 (SCC : AIR para 19).

17. In our opinion Section 156(3) CrPC is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an FIR and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156(3) CrPC, though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.

18. It is well settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where

an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary for its execution."

6. The said ratio has been followed in Sudhir Bhaskarrao Tambe v. Hemant Yashwant Dhage and Others (2016) 6 SCC 277 in which it is observed.

"2. This Court has held in Sakiri Vasu v. State of U.P. (2008) 2 SCC 409 that if a person has a grievance that his FIR has not been registered by the police, or having been registered, proper investigation is not being done, then the remedy of the aggrieved person is not to go to the High Court under Article 226 of the Constitution of India, but to approach the Magistrate concerned under Section 156(3) CrPC. If such an application under Section 156(3) CrPC is made and the Magistrate is, prima facie, satisfied, he can direct the FIR to be registered, or if it has already been registered, he can direct proper investigation to be done which includes in his discretion, if he deems it necessary, recommending change of the investigating officer, so that a proper investigation is done in the matter. We have said this in Sakiri Vasu case because what we have found in this country is that the High Courts have been flooded with writ petitions praying for registration of the first information report or praying for a proper investigation.

3. We are of the opinion that if the High Courts entertain such writ petitions, then they will be flooded with such writ petitions and will not be able to do any other work except dealing with such writ petitions. Hence, we have held that the complainant must avail of his alternate remedy to approach the Magistrate concerned under Section 156(3) CrPC and if he does so, the Magistrate will ensure, if prima facie he is satisfied, registration of the first information report and also ensure a proper investigation in the matter, and he can also monitor the investigation.

4. In view of the settled position in Sakiri Vasu case, the impugned judgment of the High Court cannot be sustained and is hereby set aside. The Magistrate concerned is directed to ensure proper investigation into the alleged offence under Section 156(3) CrPC and if he deems it necessary, he can also recommend to the SSP/SP concerned a change of the investigating officer, so that a proper investigation is done. The Magistrate can also monitor the investigation, though he cannot himself investigate (as investigation is the job of the police). Parties may produce any material they wish before the Magistrate concerned. The learned Magistrate shall be uninfluenced by any observation in the impugned order of the High Court."

4. The law on the subject was also recognized by the two Hon'ble Judges Bench of the Hon'ble Supreme Court in ***T.C. Thangaraj*** *vs.* ***V.Engammal and others (2011) 12 SCC 328*** wherein after taking into consideration the judgment in ***Sakiri Vasu's case*** (supra), it was held as under:

"12. It should also be noted that Section 156(3) of the Code of Criminal Procedure provides for a check by the Magistrate on the police performing

their duties and where the Magistrate finds that the police have not done their duty or not investigated satisfactorily, he can direct the Police to carry out the investigation properly, and can monitor the same. (see Sakiri Vasu v. State of U.P. (2008) 2 SCC 409).

5. In view of the aforesaid discussion and reasons stated above, we decline to interfere and dispose of the writ petition accordingly, reserving liberty to the petitioner to invoke the powers of the Magistrate, as available to her, under the Code of Criminal Procedure. The parties are left to bear their own costs. Pending application, if any, also stands disposed of.

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

Sandeep Nirala

...Petitioner.

Versus

State of Himachal Pradesh

...Respondent.

Cr.MP(M) No. 1892 of 2020
Date of Decision : 28th October, 2020

Code of Criminal Procedure, 1950-Anticipatory bail-section 438 Cr. P.C -under sections 323,363,366,376IPC-PETITIONER-Accused of commission of offences of kidnapping, raping, hurting and stupefying another married lady aged 28 years-apprehending imminent arrest-petitioner has no criminal history

pretrial incarceration needs justification depending upon offences heinous nature – Terms of sentence prescribed in the statue of such a crime- probability of accused fleeing from justice, hampering the investigation, criminal history of accused and doing away with victim and witnesses- The court is under an obligation to maintain a balance between all stakeholders and safeguard the interest of victim, accused,society and state While deciding bail application-courts should discuss evidence relevant only for determing bail- The possibility of the accused influencing course of the investigation, tampering with evidence, intimidating the witnesses and likely hood of fleeing from justice can be taken care of by imposing elaborative and stringent conditions

As per petition-both are adults - Adultery is no more offence because section 497 I P C was struck down by Hon'ble apex court in Joseph shine judgement

The sequence of events as mentioned in F I R reveals that victim is silent of drawing attention of any body through her, sojourn for 12 days-During visiting various places, she would have got enormous opportunities to get rid of petitioner if she was unwilling to travel with him-Narration of events would not justify pre trial incarceration – a case of bail made out.

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. Vijay Chaudhary, Advocate.

For the respondent : Mr. Nand Lal Thakur, Addl. A.G. and Mr. Rajat Chauhan, Law Officer, for the State.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

The following judgment of the Court was delivered:

Anoop Chitkara, Judge (oral)

A married male aged 42 years, arraigned as an accused for commission of offences of kidnapping, raping, hurting and stupefying another married lady aged 28 years, now apprehending imminent arrest, has come up under section 438 Cr.PC, seeking anticipatory bail.

2. Based on the complaint of complainant, the police registered FIR No.159 of 2020, dated 26.10.2020, under Sections 323, 363, 366, 376 of the Indian Penal Code, 1860, (IPC), in Police Station, Dharampur, District Mandi, Himachal Pradesh, disclosing cognizable and non-bailable offences.

3. The petitioner's criminal history relating to the offences prescribing sentence of greater than seven years of imprisonment or when on conviction, the sentence imposed was more than three years: The contents of the petition do not reveal any criminal history.

4. Briefly, the allegations against the petitioner are that on 26.10.2020, the victim with her mother visited Police Station, Dharampur and informed them that she is a married women. Her husband is an alcoholic. In the liquor vend, he came in touch with accused Sandeep Nirala. In the community, people say that prior to the lock-down, the said accused was running his Clinic somewhere outside and now has returned to home. The accused became friend with her husband and thus started visiting her home. On 11.10.2020, at 7:00 p.m., the victim suddenly got fever and to get medicine, her husband went to the petitioner. However, on reaching there, the petitioner Sandeep Nirala and the driver of the taxi in which her husband was supposed to bring the medicine, took liquor and lost senses. In the night, the petitioner telephonically called her and told that her husband is totally intoxicated and asked her to take

him back to home, but due to the reason that the victim was having fever, as such, she requested the petitioner to drop her husband to home. After that, both, the accused and the taxi driver brought her husband to home and the accused also gave her medicine of fever. After taking the medicine, the victim started having giddiness and she lost consciousness. In the next morning, when she re-gained consciousness, she found herself in the company of petitioner, Sandeep Nirala and taxi driver at Jirakpur, Chandigarh. This stunned her and when she inquired about her family, he threatened her with dire consequences and asked her to keep quite. On 12th, the accused took her to Gurugram where she remained with him and he forcibly committed coitus with her. On 13th, a friend of the petitioner gave him money and asked him to drop her home because due to her gone missing, FIR had been registered by her family members. After that, the accused took her to Chandigarh and took a room in a hotel and even there he forcibly committed coitus with her and also gave beatings. He told her that he would drop her on the next morning i.e. on 15th. On 15th, instead of dropping her home, he took her to Rajasthan where he also continued committing forcible coitus and giving beatings to her because she was pressurizing him to drop her to home. After that on 19th, petitioner Sandeep Nirala brought her to Shimla and stayed with her till 23rd and even there he committed forcible sexual intercourse and gave beatings to her. On 23rd, he started to drop her home, but when they reached near Bilaspur then he dropped her there and they stayed there in the night. Next morning, at 6:00 a.m., petitioner received a phone call and asked him to come from a private vehicle instead of coming by bus. In these circumstances, she was able to come home. On the basis of these allegations, the present FIR came to be registered.

5. The Counsel for the petitioner contends that incarceration before the proof of guilt would cause grave injustice to the petitioner and his family. The petitioner contends that he knows the victim from the beginning and they had voluntarily left their homes and where ever he went she was willing to go. He further submits that due to family pressure, a false story has been concocted leading to registration of the FIR.

6. While opposing the bail, the alternative contention on behalf of the State is that if this Court grants bail, such order must be subject to conditions, especially of not repeating the criminal activities.

ANALYSIS AND REASONING:

7. 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.

8. 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. However, while deciding bail applications, the Courts should discuss evidence relevant only for determining bail. The difference in the order of bail and final judgment is similar to a sketch and a painting. However, some sketches are in detail and paintings with a few strokes.

9. The bail petition is supported by an affidavit. The petitioner has stated that both of them are adults. Although, they are married, but now adultery is no more an offence because Section 497 of IPC was struck down by Hon'ble the Supreme Court in *Joseph Shine* judgment.

10. The sequence of events as mentioned in the FIR, reveals that the victim is silent of drawing attention of anybody through her sojourn from 12th till 23rd, i.e. for 12 days. During visiting various places and big cities, she would have got enormous opportunities to get rid of the petitioner, if she was unwilling to travel with him.

11. I have read the FIR and the status report and I do not think that the narration of events would justify pre-trial incarceration.

12. An analysis of the evidence does not justify incarceration of the accused, nor is it going to achieve any significant purpose, making out a case for bail.

13. 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. In **Sushila Aggarwal**, (2020) 5 SCC 1, Para 92, the Constitutional bench held that unusually, subject to the evidence produced, the Courts can impose restrictive conditions.

14. 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, and in the event of arrest the petitioner shall be released on bail in the FIR mentioned above, on his furnishing a personal bond of INR 10,000/, (INR Ten thousand only), with one surety for INR 5,000 (INR Five thousand only), to the satisfaction of the Investigator/ SHO of the concerned Police Station. The furnishing of bail bonds shall be deemed acceptance of all stipulations, terms, and conditions of this bail order:

a) 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).

b) 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.

c) The petitioner shall join and cooperate in the investigation, and failure to do so shall entitle the prosecution to seek cancellation of the anticipatory bail granted by the present order. (Kala Ram v. State of Punjab, 2018 (11) SCC 350).

d) 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.

e) 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.

f) 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.

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

h) 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.

i) 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.

j) 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.

k) 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 the concerned Court, if such stage arises.

l) **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**.

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 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.

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. Otherwise, the bail bonds shall continue to remain in force throughout the trial following the mandate of the Constitutional Bench in **Sushila Aggarwal,** (2020) 5 SCC 1, Para 92, wherein the Constitutional bench held that anticipatory bail can continue until the end of the trial; however, the Courts can limit the bail period's tenure if unique or peculiar features require.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. The Investigating Officer 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.

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 the Trial Court or even to this Court.

22. In return for the protection from incarceration, 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.

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

Kehar Singh Khachi & another ...Petitioners.

Versus

State of Himachal Pradesh & another ..Respondents.

Cr.MMO No.313 of 2016
Reserved on: 29.10.2020
Date of Decision: November 2, 2020

Code of Criminal Procedure, 1973- Section -173 of Cr.P.C. – Section 420, 34 of IPC- An FIR was registered against the accused persons that dishonest and fraudulent act was committed by them – ACJM(1) Shimla took cognizance and notices issued to the accused persons – Order was challenged before the Hon'ble High Court on the basis that entire transaction was based on oral agreement - Held, that at the time of taking cognizance of offence, it is not necessary for

the Magistrate to find out as to whether trial is clearly going to culminate into conviction of accused or not- That Magistrate has only to see whether there in prima facie evidence on record for possibility of commission of offence- Petition dismissed.

Cases referred:
G. Sagar Suri and another vs. State of U.P. and others, (2000) 2 SCC 636;
M.N. Ojha and others vs. Alok Kumar Srivastav and another, (2009) 9 SCC 682;
Gorige Pentaiah vs. State of Andhra Pradesh and others, (2008) 12 SCC 531;
Parbatbhai Aahir alias Parbatbhat Bhimsinghbhai Karmur and others, (2017) 9 SCC 641;
Central Board of Trustees vs. Indore Composite Private Limited, (2018) 8 SCC 443;
Vir Prakash Sharma vs. Anil Kumar Agarwal and another, (2007) 7 SCC 373;
V.Y. Jose and another vs. State of Gujarat and another, (2009) 3 SCC 78;
Vinod Natesan vs. State of Kerala and others, (2019) 2 SCC 401;
Chandran Ratnaswami vs. K.C. Palanisamy and others, (2013) 6 SCC 740;
State of Haryana and others vs. Bhajan Lal and others, 1992 Supp.(1) SCC 335;
Sunita Jain vs. Pawan Kumar Jain and others, (2008) 2 SCC 705;
Som Mittal vs. Government of Karnataka, (2008) 3 SCC 574;
Rajiv Thapar and others vs. Madan Lal Kapoor, (2013) 3 SCC 330;
Sesami Chemicals Private Limited vs. State of Meghalaya and others (2014) 16 SCC 711;
Taramani Parakh vs. State of Madhya Pradesh and others, (2015) 11 SCC 260;
Kamlesh Kumari and others vs. State of Uttar Pradesh and another, (2015) 13 SCC 689;
Amanullah and another vs. State of Bihar and others, (2016) 6 SCC 699;
Municipal Corporation of Delhi vs. Ram Kishan Rohtagi and others, (1983) 1 SCC 1;
Hamida vs. Rashid alias Rasheed and others, (2008) 1 SCC 474;
Amit Kapoor vs. Ramesh Chander and another, (2012) 9 SCC 460;
N. Soundaram vs. P.K. Pounraj and another, (2014) 10 SCC 616;
Rakhi Mishra vs. State of Bihar and others, (2017) 16 SCC 772;
Sonu Gupta vs. Deepak Gupta, (2015) 3 SCC 424;

For the Petitioners: Mr. B.M. Chauhan, Advocate, with Mr.M.S. Katoch, Advocate, through Video Conferencing.

For the Respondent: Mr. Desh Raj Thakur, Additional Advocate General, with M/s Raju Ram Rahi and Gaurav Sharma, Deputy Advocate Generals, for respondent No.1-State, through Video Conferencing.

Mr. R.K. Bawa, Senior Advocate with Mr.Ajay Kumar Sharma, Advocate, for respondent No.2, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Present petition has been preferred against impugned order dated 27.05.2016, passed by learned Additional Chief Judicial Magistrate (1), Shimla, H.P., in case titled as *State*

vs. Kehar Singh Khachi, FIR No.341 of 2015, dated 21.12.2015, registered in Police Station, Sadar, Shimla, by respondent No.2-complainant, whereby learned Magistrate has taken cognizance under Section 173 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') for alleged commission of offence punishable under Section 420 read with Section 34 of the Indian Penal Code (in short 'IPC') and notices have been issued to the petitioners.

2. Prosecution case, in brief, is that petitioners had shown a big vacant plot situated in Shimla to respondent No.2-complainant, available for sale and petitioner No.1 disclosed to respondent No.2 that the said land was owned by different persons and he was holding Power of Attorney of some of such owners and he had also shown General Power of Attorney(s) to respondent No.2-complainant, executed in his favour. As respondent No.2-complainant and her husband were interested to purchase a plot for construction of their residence, complainant, being persuaded by the size of vacant piece of land, readily agreed to buy the said plot and for purchasing the said plot an amount of ₹1,00,70,000/- was transferred by respondent No.2-complainant to petitioner No.1 during October 2008 to July 2011. During this period, some sale deeds were also executed through petitioner No.1, in favour of complainant for a land worth ₹70,00,000/-.

3. It is further case of the prosecution that petitioner No.1 had also executed a sale deed in favour of his son (petitioner No.2 herein) for sale consideration of ₹18,00,000/- with respect to a piece of land out of the vacant land shown to the complainant on 19.07.2011 and thereafter, when petitioner No.1 demanded more money for purchasing remaining land, respondent No.2-complainant had reminded him that total amount of ₹97,70,000/- had already been received by him and, therefore, no more money could be paid to him, as only a sum of ₹70,00,000/- had been spent for purchasing four pieces of land.

4. It is further case of the prosecution that petitioners, instead of purchasing property in the name of complainant misappropriated her money and got executed sale deed in favour of petitioner No.2 knowing fully that entire piece was shown to respondent No.2-complainant and she was intending to purchase entire land and making payments to petitioner No.1 as per his demands. On the basis of record of the bank, it has come during investigation that respondent No.2-complainant had transferred a sum of ₹1,00,70,000/- in favour of petitioner No.1 either herself or by her husband or through her mother, through cheque(s)/online transaction/transfer. Consideration for the sale deed, executed in favour of respondent No.2-complainant, through petitioner No.1 was ₹70,00,000/- and a sum of ₹30,70,000/- was found to have been received in excess by petitioner No1. Retaining ₹30,70,000/- and execution of sale deed in favour of petitioner No.2, allegedly misappropriating money received from respondent No.2-complainant of a portion of a plot which was shown to

respondent No.2-complainant, as per investigation, was found to be dishonest and fraudulent act committed by the petitioners attracting provisions of Section 420 read with Section 34 IPC and accordingly challan for commission of aforesaid offences has been submitted in the Court under Section 173(2) Cr.P.C., wherein on the basis of material on record, learned Magistrate has taken cognizance as stated supra.

5. Taking cognizance of commission of offence by learned Magistrate has been assailed on the ground that entire transactions, in question, are based on alleged oral agreement which was never documented and no Khasra number(s) with specific area was/were ever agreed to be made available by the petitioners to respondent No.2-complainant for sale/purchase and petitioner No.1 was having General Power of Attorney of a few original owners and he had executed sale deeds on behalf of those owners in favour of respondent No.2-complainant and remaining owners had sold the land to petitioner No.2, wherein petitioner No.1 had no role and, therefore, no act of petitioners can be termed as dishonest or fraudulent act. It is further contended that respondent No.2-complainant has also filed a Civil Suit for recovery of the amount and pleadings in the Civil Suit are the same as the pleadings in the present petition. It is also contended that ingredients for commission of offence under Section 420 IPC i.e. inducement or deception at initial stage and dishonest and fraudulent behaviour on the part of the petitioners is missing in the complaint for want of evidence and, therefore, no case under Section 420 IPC is made out, but despite that learned Magistrate, in applying his mind in mechanical manner has taken cognizance in the case. Further that dispute between the parties is, at the most, a civil dispute for which appropriate remedy is Civil Suit, which has already been availed by respondent No.2-complainant. Lastly, it is argued that present complaint has been lodged because of political vendetta to pressurize the petitioners in party affairs of mother of respondent No.2-complainant, who happened to be a Cabinet Minister at the time of lodging the complaint.

6. Learned counsel for the petitioners referring pronouncements of the Apex Court in ***G. Sagar Suri and another vs. State of U.P. and others, (2000) 2 SCC 636M.N. Ojha and others vs. Alok Kumar Srivastav and another, (2009) 9 SCC 682; Gorige Pentaiah vs. State of Andhra Pradesh and others, (2008) 12 SCC 531; Parbatbhai Aahir alias Parbatbhat Bhimsinghbhai Karmur and others, (2017) 9 SCC 641;*** and ***Central Board of Trustees vs. Indore Composite Private Limited, (2018) 8 SCC 443,*** has contended that Magistrate has failed to perform its role as required under law, to be performed at the time of taking the cognizance and thus, it is a fit case for quashing FIR and criminal proceedings, exercising inherent powers by this Court under Section 482 Cr.P.C.

7. Learned counsel for the petitioners has also relied upon pronouncements of the Apex Court in ***Vir Prakash Sharma vs. Anil Kumar Agarwal and another, (2007) 7 SCC 373; V.Y. Jose and another vs. State of Gujarat and another, (2009) 3 SCC 78;*** and ***Vinod Natesan vs. State of Kerala and others, (2019) 2 SCC 401***, and submitted that for taking cognizance of commission of offence punishable under Section 420 IPC, essential ingredients for commission of such offence must be on record and in present case there is no evidence on record with respect to fraudulent or dishonest act on the part of petitioners so as to induce or deceive respondent No.2-complainant or intentionally induce her to do or omit to do anything which she would not have done or omitted if were not deceived and which act or commission causes or is likely to cause damage or harm to body, mind, reputation or property of respondent No.2-complainant.

8. Lastly, it is contended on behalf of the petitioners that lodging of FIR and initiation of criminal proceedings against petitioners is a clear case of abuse of process and is contrary to the pronouncements of the Apex Court in ***Gorige Pentaiah's*** case supra and ***Chandran Ratnaswami vs. K.C. Palanisamy and others, (2013) 6 SCC 740.***

9. Reliance on behalf of the petitioners has also been put on pronouncements of the Apex Court passed in ***Cr.Appeal No.1395 of 2018, titled as Anand Kumar Mohatta and another vs. State (Govt. of NCT of Delhi, decided on 15.11.2018*** and ***Cr.Appeal No.238 of 2019, titled as Prof. R.K. Vijayasarathy & another vs. Sudha Seetharam & another, decided on 15.02.2019.***

10. Learned counsel appearing for respondent No.2-complainant has submitted that there is overwhelming evidence on record to *prima-facie* reflect that the omission and commission on the part of the petitioners was dishonest and preplanned, whereby they fraudulently induced respondent No.2-complainant to deliver amount to purchase a property and after receiving money utilized some part thereof for benefit of respondent No.2-complainant but misappropriated another part of the amount to purchase a plot in favour of petitioner No.2, son of petitioner No.1 that too out of the plot shown to respondent No.2-complainant. It is also contended that a handsome amount of more than `30,00,000/- has been retained and misappropriated by petitioners in their favour as land for worth of `70,00,000/- only had been transferred in favour of respondent No.2-complainant after receiving `1,00,70,000/-.

11. Referring pronouncements of the Apex Court in ***State of Haryana and others vs. Bhajan Lal and others, 1992 Supp.(1) SCC 335; Sunita Jain vs. Pawan Kumar Jain and others, (2008) 2 SCC 705; Som Mittal vs. Government of Karnataka, (2008) 3 SCC 574; Rajiv Thapar and others vs. Madan Lal Kapoor, (2013) 3 SCC 330; Sesami Chemicals Private Limited vs. State of Meghalaya and others (2014) 16 SCC 711;***

Taramani Parakh vs. State of Madhya Pradesh and others, (2015) 11 SCC 260; Kamlesh Kumari and others vs. State of Uttar Pradesh and another, (2015) 13 SCC 689; and ***Amanullah and another vs. State of Bihar and others, (2016) 6 SCC 699***, it is contended that for quashing of FIR, inherent powers under Section 482 Cr.P.C., should only be used either to prevent abuse of the process of any Court or otherwise to secure the ends of justice in rarest of rare cases, where no *prima facie* case is constituted or made out against the accused. It is also canvassed that act of petitioners subsequent to receiving huge amount from respondent No.2-complainant, by not utilizing entire amount for benefit of respondent No.2-complainant and using a sum of ₹18,00,000/- for purchase of a plot in favour of petitioner No.2, unambiguously establishes the preplanned dishonest intention of petitioners to defraud respondent No.2-complainant.

12. Petition has also been opposed on behalf of respondent No.1-State, on the ground that Investigating Agency has conducted impartial inquiry and thereafter on the basis of evidence collected, has filed challan in the Court and further that filing of the Civil Suit for recovery is not the ground for quashing a criminal case.

13. Referring pronouncements of the Apex Court passed in ***Municipal Corporation of Delhi vs. Ram Kishan Rohtagi and others, (1983) 1 SCC 1; Hamida vs. Rashid alias Rasheed and others, (2008) 1 SCC 474; Amit Kapoor vs. Ramesh Chander and another, (2012) 9 SCC 460;*** and ***N. Soundaram vs. P.K. Pounraj and another, (2014) 10 SCC 616,*** it is contended that inherent power of the High Court under Section 482 Cr.P.C. shall be exercised only there where the allegations set out in the complaint or charge-sheet do not constitute any offence and as, in the present case, there is sufficient evidence to establish ingredients of commission of offence under Section 415 IPC punishable under Section 420 IPC, interference of High Court is not warranted.

14. There is no dispute with respect to ratio of law laid down by the Apex Court in the judgments referred by learned counsel for the parties. Inherent power of the High Court can be exercised either to prevent abuse of process of any Court or otherwise to secure the ends of justice. The Apex Court in ***Rakhi Mishra vs. State of Bihar and others, (2017) 16 SCC 772***, referring ***Sonu Gupta vs. Deepak Gupta, (2015) 3 SCC 424***, has reiterated that it is a settled law that power under Section 482 Cr.P.C. for quashing of FIR is exercised by the High Court only in exceptional circumstances when even *Prima-facie* case is not made out against the accused. Test applied by the Court for interference at the initial stage of a prosecution is whether the uncontroverted allegations *prima-facie* establish a case or not.

15. It is settled that at the time of taking cognizance of offence, it is not necessary for the Magistrate to find out as to whether trial is clearly going to culminate into conviction of

accused or not, but the Magistrate has only to see whether there is *prima-facie* evidence on record so as to construe that there is possibility of commission of offence by the accused and even if there is evidence raising suspicion of commission of offence by accused the cognizance can be taken by the Magistrate and thereafter the accused has a right to put his version before the Court on the basis of evidence on record at the time of framing of Charge.

16. Parameters to be taken into consideration by the Court at the time of framing of charge are altogether different than that to be taken into consideration at the time of taking cognizance. At the time of taking of cognizance, Magistrate has to look into that material only which is placed before him by the Prosecution/Investigating Agency, but at the time of consideration of charge Magistrate can take into consideration certain facts and documents pointed out and/or submitted by or on behalf of accused and thereafter he can take a decision as to whether there is sufficient material for framing of charge or not. Recently this Court in case ***Siemens Enterprise Communications Pvt.. Ltd. now known as Progility Technologies Pvt. Ltd. vs. Central Bureau of Investigation,*** reported in ***2019 (3) Shim. LC 1691,*** on the basis of ratio of law propounded by the Apex Court in its various pronouncements, has reiterated the power of the Magistrate as well as parameters to be taken into consideration at the time of framing of charge. It is also settled that at the time of undertaking such exercise at the time of framing of charge the Magistrate is not supposed to conduct a mini trial at the stage of framing of charge and not to appreciate evidence as warranted at the stage of conclusion of trial, but he has power to evaluate material and the documents on record alongwith material being referred by the accused if the said parameter confirms to the parameters laid down by the Apex Court reiterated in Siemens' case supra. Whereas at the stage of taking cognizance, as already stated supra, on consideration of material placed before Magistrate by prosecution/investigating agency, even if there is evidence raising suspicion of commission of offence by accused the cognizance can be taken.

17. No doubt, the evidence or material placed before the Magistrate, at the time of taking cognizance, is not to be evaluated on merit, but definitely it is duty of the Court to see as to whether some evidence is available on record or not. In case, there is no evidence on record to indicate commission of alleged offence(s), the Magistrate is not supposed to act as a Post Office, but is expected to apply his judicial mind according to facts and circumstances of the case for accepting or rejecting the challan/report filed before him under Section 173 Cr.P.C.

18. Section 415 IPC defines cheating as under:-

> "Section 415. Cheating.-Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so

> deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"."

19. Section 420 IPC reads as under:-

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

20. For making out an offence of cheating following ingredients are essential:-

> (i) Deception of a person either by making either by making a false or misleading representation or by other action or omission;
> (ii) Fraudulently or dishonestly inducing any person to deliver any property; or to consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.

21. For the purpose of constituting an offence of cheating complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation.

22. In present case, petitioner No.1 has shown a plot to respondent No.2-complainant, available for sale, pretending that he was having Power of Attorney of some of owners and thus, would be able to manage the execution of sale deed of the said property in favour of respondent No.2-complainant and induced by his representation, respondent No.2-complainant was made to deliver an amount of `1,00,70,000/- to petitioner No.1, out of which a sum of `70,00,000/- was utilized by the petitioners for executing sale deed in favour of respondent No.2-complainant, but rest `30,00,000/- was retained without any explanation. Rather, it appears from record that out of that a sum of `18,00,000/- has been misappropriated by petitioner No.1 to purchase a piece of land in favour of his son petitioner No.2 that too from the property which was shown to respondent No.2-complainant, available to her for purchase. Not only this, petitioner No.1 is completely silent about balance amount of `30,70,000/- which definitely indicates dishonest intention on the part of the petitioners. Investigating Agency has

placed on record alongwith challan details of transactions alongwith documents made by respondent No.2-complainant or on her behalf by her husband or mother in favour of petitioner No.1 and also sale deeds executed by petitioner No.1 in favour of respondent No.2-complainant, which clearly indicate that a sum of `30,70,000/- was retained by petitioner No.1. Therefore, for material placed before learned Magistrate, it cannot be said that allegations made in First Information Report, if accepted to be true in its entirety, did not *prima-facie* constitute any offence or make out a case against petitioners at their face value. Rather, there was sufficient material before the Magistrate to take cognizance of the offence alleged to have been committed by the petitioners, as the record so produced is sufficient to construe that there is possibility of commission of offence. Needless to say, petitioners have a right to put their version before the Court at the stage of consideration of Section 227 Cr.P.C. before framing of charge under Section 228 Cr.P.C.

23. There may be cases where a victim has a right to proceed against the culprit simultaneously by filing criminal case for commission of offence, ingredients where of exist in the facts and circumstances of the incident and also to proceed with civil action by filing a Civil Suit for recovery of loss caused by the accused person. Filing of Civil Suit for redressal of damages does not bar a person from initiating a criminal case involving ingredients of criminal offence entitling plaintiff/complainant to initiate criminal case against the offender. Therefore, filing of Civil Suit for recovery, in present case, does not create bar to respondent No.2-complainant to lodge FIR against the petitioners.

24. In view of above discussion, no interference is warranted in the impugned order and accordingly, present petition is dismissed in aforesaid terms. Pending application(s), if any, also stand disposed of.

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

Sh. Rahul Patial .....Petitioner.

Versus

State of H.P. & ors. .....Respondents.

CWP No. 3088 of 2019
Reserved on: 28.10.2020.
Decided on: 02.11.2020.

Constitution of India, 1950- Article 226 –Petitioner applied for recruitment of Police Constable as a general category candidate – Respondent No.5 also applied as OBC candidate after availing the benefit of age relaxation- petitioner was placed at Sr. No.1 in the waiting list of male (General) unreserved category whereas respondent No.5 was placed at Sr. No. 14 of the merit

list of male general (Unreserved) category – Writ petition filed by the petitioner asserting that he was wrongly kept at Sr. No.1 in the waiting list – The Hon'ble High Court has held that respondent No.5 is required to be shifted from general category to merit list of OBC (Unreserved)- Petition allowed with direction to the respondent to re-draw the merit list.

Case referred:

Niravkumar Dilipbhai Makwana versus Gujarat Public Service Commission and others, (2019) 7 SCC 383,

For the petitioner : Mr. Onkar Jairath & Mr. Shubham Sood, Advocates.

For the respondents : Mr. Ashok Sharma, Advocate General with Mr. Vinod Thakur, Mr. Shiv Pal Manhans, Addl. AGs, Ms. Bhupinder Thakur, Ms. Seema Sharma and Mr. Yudhbir Singh Thakur, Dy. AGs for respondents No. 1 to 4.

Mr. Ajay Sharma, Senior Advocate with Ms. Aanandita Sharma, Advocate, for respondents No. 5 & 6.

Ms. Meera Devi and Mr. Hemant Kumar Thakur, Advocates, for respondent No. 7.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, *Judge*

Petitioner asserts that private respondent No. 5 Shubham Chaudhary has been wrongly selected and appointed as a Constable against a post meant for General (unreserved) category. Respondent No. 5 having applied and availed the benefit of age and fee relaxation in the recruitment process is required to be considered under the OBC category.

2. A recruitment notice was issued on 3.3.2019 for filling-in various posts of Constables. 81 posts of Constables were to be filled in District Una. As per recruitment procedure, following criteria in respect of age limit for candidates belonging to different categories was prescribed:

Sr. No.	Category	Age	Edu. Qlf.	Height	Chest
1.	General	18 to 23 years	xxxx	xxxx	xxxx

2.	SC/ST	18 to 25 years	xxxx	xxxx	xxxx
3.	OBC	18 to 25 years	xxxx	xxxx	xxxx

In terms of Note(i) of clause-3 of the recruitment notice, the cut-off date for calculation of upper and lower age was 1.1.2019 for all categories.

Petitioner with 16.9.1996 as his date of birth applied as a general category candidate under the recruitment notice. Respondent No. 5 Shubham Chaudhary with 1.1.1996 as his date of birth hadapplied as an OBC candidate.

Respondent No. 5 with 65 marks and date of birth as 1.1.1996 belonging to OBC category was placed at serial No. 14 of the merit list of male general (unreserved) category for recruitment of police Constable in District Una. Petitioner with 64 marks was placed at serial No. 1 in the waiting list of male general (unreserved) category.

3. Instant writ petition has been instituted by the petitioner asserting that he was wrongly kept at serial No. 1 in the waiting list of male general (unreserved) category. Respondent No. 5-Shubham Chaudhary had applied as an OBC candidate in the recruitment process after availing the benefit of age relaxation, therefore, merely on the basis of higher marks secured by respondent No. 5, his name could not be reflected in the merit list of general category candidates.

4. The factual position projected in the writ petition has not been disputed either by the State or by any of the private respondents including respondent No. 5 during hearing of the writ petition. Respondent No. 5 with 1.1.1996 as his date of birth had completed 23 years on 31.12.2018. As per F.R. 56(a):-

> *"Except as otherwise provided in this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years: Provided that a Government servant whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty years....."*

Respondent No. 5 was in his 24th year on the cut off date of 1.1.2019. For general category candidates, the age limit was 23 years as on 1.1.2019 whereas candidates belonging to OBC category upto 25 years of age as on 1.1.2019 could partake in the selection process. For participating in the selection process, respondent No. 5 has availed the relaxation in age limit as provided in the recruitment notice for the candidates belonging to OBC category. Hence, in

view of judgment passed by Hon'ble Apex Court in ***(2019) 7 SCC 383,*** titled ***Niravkumar Dilipbhai Makwana*** versus ***Gujarat Public Service Commission and others,*** respondent No. 5 could not be allowed to migrate to general category on the basis of his marks.

5. In the supplementary affidavit filed on behalf of respondents No. 1 to 4, it has been submitted that:- shifting of respondent No. 5 from general category merit list to his own category i.e. OBC merit list would in turn result in displacement of respondent No. 6 Shiv Kumar, who is presently placed at last serial No. 6 of merit list of male OBC (unreserved) and belongs to IRDP category; Respondent No. 6 would switch over to merit list of male OBC (IRDP) category;This will ultimately adversely affect respondent No. 7 Amandeep, who will move out of the merit list of male OBC (IRDP) category and will eventually loose his provisional appointment as a Constable in male OBC (IRD) category.

Learned Counsel for respondent No. 7 submitted that for the faults of respondents No. 1 to 4, respondent No. 7 may not be made to suffer as he had not concealed any facts in his application and pursuant to his provisional appointment, respondent No. 7 is currently undergoing training.

Respondent No. 5 having admittedly taken the benefit of relaxation in age limit is required to be shifted from general category merit list to the merit list of male OBC (unreserved). If in such process respondent No. 7 gets adversely affected, even then the logical consequences flowing from migration of respondent No. 5 from general category merit list to OBC (unreserved) merit list cannot be halted. We accordingly allow this writ petition by directing respondents No. 1 to 4 to re-draw the merit list of provisionally selected male general (unreserved) category for recruitment of police Constables in District Una, batch-2019, by shifting respondent No. 5 Shubham Chaudhary to his appropriate place in the merit list of male OBC (unreserved) category in light of the observations made heretobefore. Entire resultant process be completed within a period of two weeks from today.

Petition is allowed in these terms. Pending application(s), if any, shall also stand disposed of.

List for compliance on **23.11.2020.**

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

Anand Moudgil ....Petitioner

Versus

The Chairman-State Transport Authority of
Himachal Pradesh . ....Respondent

CWP No.3741 of 2020
Reserved on: 29th October, 2020
Decided on: 2nd November, 2020

Constitution of India, 1950 - Article 226- The petitioner applied for the six Stage Carriage Route permits- State transport authority rejected the application – Writ petition filed on the ground that RTA has misused the power and arbitrarily indulging in dolling out route permits – It was held that these route permits were applied by the petitioner on his own and were not identified or notified – All the permits applied for by him are 100% on National/ State Highways – Application of the petitioner for plying 6 stage Carriage Routes rightly rejected by respondent –Petition dismissed as having no merit.

Case referred:

Ajay Parihar Versus State of HP & Ors, CWP No.7295 of 2012,

Mithilesh Garg Versus Union of India and others, (1992) 1 SCC 168,

Pancham Chand and others Versus State of Himachal Pradesh and others, 2008 (7) SCC 117,

For the Petitioner: In person.
For the Respondent: Mr. Ashok Sharma, Advocate General with Mr. Vinod Thakur, Mr. Shiv Pal Manhans, Additional Advocates General and Mr. Bhupinder Thakur, Ms. Seema Sharma & Mr. Yudhvir Singh Thakur, Deputy Advocates General.

(Through Video Conference)

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

Application of the petitioner to ply various Stage Carriage Routes was rejected by the respondent, hence, he has preferred instant writ petition.

2. The petitioner in 2011 applied for following Stage Carriage Route Permits:-

(i). Shimla to Manali via Bilaspur-Ghumarwin-Hamirpur-Jawalaji-Kangra-Dharamshala.

(ii). Shimla to Dharamshala via Bilaspur-Ghumarwin-Hamirpur-Jwalaji-Kangra- Dharamshala.

(iii). Shimla to Parwanoo via Solan and vice versa.

(iv). (iv). Manali to Shimla via Dharamshala-Kangra-Jawalaji-Hamirpur-Ghumarwin-Bilaspur.

(v). Dharamshala to Shimla via Kangra-Jawalaji- Hamirpur-Ghumarwin-Bilaspur.

(vi). Parwanoo to Shimla via Solan and vice versa.

The application was rejected by Regional Transport Authority on 13.06.2012. CWP No.8498 of 2013 filed by the petitioner was disposed of by this Court granting liberty to the petitioner to appeal against the order. Appeal No.35 of 2013 preferred by the petitioner was disposed of by the State Transport Appellate Tribunal on 30.07.2014 by directing STA to consider the application afresh alongwith those filed by the petitioner pursuant to order dated 15.07.2014. The STA passed orders on 17.09.2014. On request of petitioner, he was once again granted opportunity of hearing before STA on 23.11.2019. Application of petitioner was finally rejected by the respondent vide order dated 23.11.2019 on the grounds:-

2(i). Transport policy formulated in the year 2004 prescribed that all new routes identified in future will have at least 60% rural and interior roads for grant of Stage Carriage Permits. No route permit will be granted for a route, which has more than 40% National/State Highway. All the Stage Carriage Route Permits applied for by the petitioner were completely on National/State Highways. Therefore, his application could not be allowed.

2(ii). In ***CWP No.7295 of 2012***, titled ***Ajay Parihar Versus State of HP & Ors***, following interim order was passed on 20.08.2012:-

> "There will be a direction to respondent No.1, 2 & 4 not to grant any route permits, for which applications have not been called for by the RTAs. In other words, without the State or RTA concerned first notifyingroute permit, there shall not be any grant of route permits as suggested or requested by operators." While deciding the writ petition finally on 18.05.2016, it was held that the Regional Transport Authorities were arbitrarily indulging in dolling out route permits and such flagrant abuse and misuse of power cannot be countenanced. These authorities were not conferred or vested with any discretionary powers to do so and were required to strictly adhere to the procedure prescribed in the Himachal Pradesh Motor Vehicle Rules,1999. It will be apt to reproduce following relevant paras from the judgment:-
>
> "11. Unfortunately these principles have been violated in wholesome in the case in hand, whereby Regional Transport Authority has arbitrarily indulged in dolling out route permits. Such flagrant abuse and misuse of power cannot be countenanced. As a matter

of fact, the Regional Transport Authority was not even conferred or even vested with any discretionary power and was thus required to have strictly adhered to the procedure as prescribed in the Rules.

12. *Therefore, when an action is taken in furtherance of explicit power given by a statute, the legitimacy of invoking such power shall depend entirely upon the extent of achieving net and objective for which the statute enables the exercise of such power.*
13. *It is more than settled that law cannot be administered with an evil eye or with an unequal hand or for an oblique or unworthy performance and the arms of this court will be long enough to reach out and strike down such a view with a heavy hand.*
14. *The Regional Transport Authority, more particularly, the Regional Transport Officer could not have abused his/their power and trust under the camouflage of performance of their public duty and thereby in an arbitrary and illegal manner allotted route permits, that too by receiving suo motu applications in utter disregard and gross violation of the procedure contemplated under the Rules.*
15. *It needs to be reiterated that public offices, both big and small, are sacred trusts. Such offices are meant for use and not abuse and in case repositories of such offices surpass the rule, then the law is not that powerless and would step in to quash such arbitrary orders.*
16. *Respondent No.4, being a creation of statute, is admittedly a State within the meaning of Article 12 of the Constitution of India and cannot, therefore, act like a private individual, who is free to act in a manner whatsoever he likes, unless it is interdicted or prohibited by law. It is settled that the State and its instrumentalities have to act strictly within the four corners of law and all its activities are government by Rules, regulations and instructions. It is more than settled that whenever a statutory authority is required to do a thing in a particular manner, then the same must be done in that manner or not at all.*
18. *From the discussion above, it is manifest that the entire procedure as adopted by the respondents stands vitiated on account of not following the mandatory procedure as prescribed under the Rules. Absence of power apart, such exercise of the respondents is fraught with danger of being*activated by extraneous considerations. The action of the respondents, to say the least, is totally arbitrary.
19. *In ordinary circumstances, this court would have cancelled all the route permits, but since petitioner too supposedly is a beneficiary of such grant in the past (as observed earlier by this court vide its order dated 15.11.2012), this court instead directs respondent No.4 to re-invite the applications for grant of route permits strictly as per procedure prescribed under the Rules within a period of four weeks from today. Till that time, arrangement as continuing as on date*

shall be continued."

To comply with the directions issued in the judgment in *Ajay Parihar's case, supra*, the respondent on 12.09.2014 constituted Route Formulation Committees at District Level and at Sub-Division Level for Stage Carriage. The Government of Himachal Pradesh has proposed to identify routes for plying of private bus operators and has notified a procedure in this regard. Petitioner has repeatedly submitted *suo-moto* applications on his own for grant of Stage Carriage Route Permits. Since these applications did not comply with the directions issued in the afore-extracted judgment and the provisions of Section 68(3)(ca) of the Motor Vehicle Act, 1988, therefore, the same were rejected. Section 68(3)(ca) reads as under:-

"[(ca) Government to formulate route for plying stage carriage; and]"

3. The petitioner appearing in person submits that reliance placed by the respondent on Transport Policy, 2004 for rejecting his application for grant of Stage Carriage Route Permits is wholly misplaced as it is the Transport Policy, 2014, which would govern the fate of his applications. He further submitted that the interim order dated 20.08.2012 passed in CWP No.7295 of 2012 stands automatically vacated upon decision of the writ petition on 18.05.2016. Therefore, his application could not have been rejected on the ground that it was submitted by him *suo-moto*. His last contention is that the judgments passed by the Hon'ble Apex Court in *Pancham Chand and others Versus State of Himachal Pradesh and others, 2008 (7) SCC 117* and *Mithilesh Garg Versus Union of India and others, (1992) 1 SCC 168*, have been wrongly not considered by the respondent. These judgments clearly apply to the case of the petitioner and thus, makes him entitled to apply for Stage Carriage Route Permits. Rejection of his application vide impugned order is not in consonance with law.

4. Learned Deputy Advocate General submitted that both the Transport Policies, i.e. 2004 as well as 2014, contain a stipulation that new routes identified in future will have to have at least 60% rural and interior routes for grant of Stage Carriage Permits. Petitioner has not disputedthis position. He has not even challenged Transport Policies either of 2004 or 2014. No rejoinder to the reply has been filed by him. Transport Policy 2014 has been placed by him on record of the case. Relevant extract from this policy is reproduced hereunder:-

"6.1 Stage Carriage Passenger Transport:

An efficient public transport is the need of a developing economy and its people. With the rising incomes, opening of new areas with development of roads, and industrial and tourism development; need for movement has risen manifold. The growth of passenger transport facilities have unfortunately not kept pace with the rising demand which has lead to the problems of overloading and use of contract carriage and private vehicles to meet the unmet demand. Our review of the current state of affairs in this segment shows that the passenger transport sector suffers from unclear and fragmented responsibilities for different aspects of the supply management of sector services and infrastructure, inadequate resource mobilization and suboptimal utilization of capacity. This has lead to wastage of time and money in moving people, high opportunity cost of resources used to maintain or expand infrastructure capacity or to subsidize certain services, poor safety outcomes causing human sufferings, economic loss and increase in inequalities, and adverse environmental impacts caused due to unplanned vehicular movement and inefficient use of non-renewable energy resources.

The policy of 60:40 will be followed in the formation of new routes and the priority will be given in allocation of permits to ex-servicemen, cooperative societies, women and unemployed people.

The policy initiatives in this segment are:

a) *A process of identification of roads, where either no services have been provided or are under served, will be done and an assessment of routes where the problem of overloading 7 exists will be completed within the next six months. After this data is available, routes will be identified for publication under section 68(ca) of the Motor Vehicles Act. Private sector participation will also be solicited along with HRTC;*

b) *Route planning exercise using the latest techniques used internationally will be done to rationalize the operation of buses and match the services with passenger demand;*

c) *Introduction of latest luxury bus services within and outside the State including travel by air conditioned buses*within the State on fares marginally higher than the normal passenger fare. For encouraging a trend towards this and making such operation economically viable, appropriate tax and non-tax incentives will be given;

d) *Encourage the use of latest Information Technology tools including vehicle tracking devices in both public as well as private sector transport services to ensure timely service delivery and real time Passenger Information System (PIS);*

e) *It shall be the endeavour of the Govt. to promote seamless and*

cashless travel across the modes by introducing pre- paid smart cards based systems. Multi-utility smart card combining all transport needs will be explored within the next six months and piloted in the State;

f) While strengthening the HRTC remains a priority, appropriate performance benchmarks will be developed to judge the performance of the Corporation. The Corporation will ensure provision of timely delivery of services at various points. For doing so, it shall undertake a comprehensive planning process which combines route planning, travel demand, stake holder's consultations and technological interventions with engineering aspects.

g) Today, a time has come when the HRTC could strive for a brand image that clearly presents their services as a modern, efficient, reliable, convenient, comfortable and safe transport. Information flow to the travelling public will be improved both on quality and quantity terms so that a passenger gets real time data with regard to movement of each and every bus. Suitable display monitors will be installed in all the bus stands, important boarding and de- boarding points and through live data on its website;

h) For matters relating to allotment of new routes to the private sector, comprehensive guidelines will be developed to handle issues relating to modification of routes, changes in 8 time table, transfer of permits, and deposit of permits etc. so that clarity and transparency is maintained in disposal of such requests;

i) New services will be added to provide to and fro 'last mile connectivity' between passenger's homes and bus terminals. Late night and early morning availability of such services shall be ensured."

Petitioner has not even disputed that six Stage Carriage Route Permits applied for by him are all 100% on National/State Highways. This ground alone is sufficient to reject his application.Further the order dated 20.08.2012 passed in CWP No.7295 of 2012 had directed the respondent not to grant any route permits for which the applications were not called for by the Regional Transport Authorities (RTAs). It was clearly directed in the order that RTA concerned has to first notify the route permit. Route Permits were not to be granted on the suggestion or request of any operator. This position was not disturbed in para 19 of the final judgment dated 18.05.2016 passed in CWP No.7295 of 2012. As per the reply, the respondent has now constituted Committees at District and Sub-Division level for Stage Carriage Route Permits and has evolved a procedure for identification of bus routes. It is not

the case of the petitioner that six Stage Carriage Route Permits were identified or notified by the respondent. Petitioner had applied for these route permits on his own. Being suo-moto application, it was rightly rejected by the respondent in light of order dated 20.08.2012 and judgment dated 18.05.2016 delivered in CWP No.7295 of 2012 and subsequent steps taken by the respondent.

The judgments cited by the petitioner in the cases of *Pancham Chand and Mithilesh Garg, supra*, are indifferent context altogether. These do not pertain to the issue in hand.

We, therefore, find no infirmity in the impugned order rejecting the application of the petitioner for plying six Stage Carriage Routes. The writ petition is, therefore, without any merit and is dismissed accordingly alongwith pending miscellaneous application(s), if any.

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

Balbir Singh .....Petitioner.

Versus

State of Himachal Pradesh and others

.....Respondents.

CWP No.1852 of 2020.
Judgment reserved on: 29.10.2020.
Date of decision: 03.11.2020.

Constitution of India, 1950,- Article 226 – Petitioner permanent resident of Bilaspur working as Superintendent Grade-I in the Forest Department was ordered to be transferred from Forest Circle office Bilaspur, to Forest circle office, Hamirpur- Order of transfers was challenged by way of writ petition on the ground that the comprehensive guiding principles- 2013 for regulating the transfer of the State Government employees are not applicable to the petitioner being Class-I officer – Held that the corporation has issued instructions over the issue of near relatives of officers/officials executing works as contractors for the concerned Divisions/ Circles of their respective postings- To avoid conflict of interests held, that public person should have clear and transparent personality- Writ petition disposed of with direction to transfer petition and 3rd respondent outside their home district.

Cases referred:

Sanjay Kumar vs. State of H.P. & Ors, Latest HLJ 2013 (HP) 1051;

For the Petitioner : Ms. Archna Dutt, Advocate.

For the Respondents: Mr.Ashok Sharma, Advocate General with Mr. Vinod Thakur, Mr. Shiv Pal Manhans, Additional Advocate

Generals, Ms. Seema Sharma, Mr. Bhupinder Thakur and Mr. Yudhvir Thakur, Deputy Advocate Generals, for respondents No. 1 and 2.

Mr. Tara Singh Chauhan, Advocate, for respondent No.3.

Inspector Rajesh Prashar along with CT. Dharmender Kumar and HHC Pritam, Police Station SV& ACB, Bilaspur, H.P. present in person

(THROUGH VIDEO CONFERENCING)

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Aggrieved by the order of transfer, the petitioner has filed the instant petition for grant of the following relief:

> "That the impugned notification dated 11.06.2020 whereby the petitioner has been transferred from Forest Circle Office, Bilapsur to Forest Circle Office, Hamirpur, H.P. at Annexure P-2 may very kindly be quashed and set aside and the petitioner may very kindly be allowed to work at the present place of posting i.e. Forest Circle Office, Bilaspur, District Bilaspur, H.P. in the interest of justice."

2. The petitioner is a permanent resident of Village Naisarli, Post Office Kothipura, Tehsil Sadar, District Bilaspur, H.P. and vide notification dated 11.06.2020 has been ordered to be transferred from Forest Circle Office, Bilaspur to Forest Circle Office, Hamirpur and in his place 3rd respondent has been ordered to be transferred from the Office of the Principal Chief Conservator of Forests (HoFF), Shimla to Forest Circle Office, Bilaspur. Both, the petitioner as also 3rd respondent are the Class-I Officers and working as Superintendents, Grade-I, in the Forest Department.

3. The petitioner was appointed as a Clerk on 19.03.1982 and remained posted at different places as given below:

Sl. No.	Name of office in which posted	Period	Remarks
1.	Rajgarh Forest Division	19.3.1982 to 24.08.1987	As Clerk
2.	Bilaspur Forest Circle	25.08.1987 to 24.10.1991	As Clerk
3.	Kunihar Forest Division	25.10.1991 to 23.08.1995	As Junior Assistant

4.	Bilaspur Forest Division	24.8.1995 to 03.6.2000	As Junior Assistant
5.	Wild Life Division Shimla	14.06.2000 to 26.10.2002	As Senior Assistant
6.	Bilaspur Forest Division	28.10.2002 to 06.08.2010	Senior Assistant/ Supdt. Gr.II
7.	Rampur Forest Circle	30.08.2010 to 07.02.2011	As Supdt. Gr.II
8.	Nalagarh Forest Division	08.02.2011 to 31.10.2014	As Supdt. Gr.II
9.	Bilaspur Forest Division	01.11.2014 to 16.04.2017	As Supdt. Gr.II
10.	Dharamshala Forest Circle	17.04.2017 to 18.06.2017	On promotion as Supdt. Gr.I
11.	Chief Conservator of Forests (Forest Protection & Fire Control) Bilaspur	19.06.2017 to 09.07.2018	As Supdt. Gr.I
12.	Conservator of Forests Bilaspur	09.07.2018 to date	As Supdt. Gr.I

4. It would be evident that in his entire career of service of 38 years, the petitioner remained posted in Forest Circle, Bilaspur, for about 30 years and at Bilapsur proper for about 21 years. Therefore, in such circumstances, the petitioner has no occasion to complain as even the Comprehensive Guiding Principles-2013 for regulating the transfer of the State Government employees are not applicable to the petitioner being a Class-I Officer and, therefore, the further plea of the petitioner that he is at the verge of retirement is not legally sustainable.

5. Moreover, it has specifically come in the reply of respondent No.3 that the wife of the petitioner is an illiterate lady and is a forest contractor and working in the same division and these averments have gone unrebutted. The public would clearly view this to be a case of conflict of interest and it is more than settled that public person should have a crystal clear and transparent personality. After-all, caesar's wife must be above suspicion.

6. As a matter of fact, the Corporation itself has taken cognizance over the issue of near relatives of Officers/Officials executing works as contractors for the concerned Divisions/Circles of their respective postings and issued instructions vide letter dated 23.10.2020, the relevant portion whereof reads as under:

> "There could be such a situation in field offices/head quarter of the department that where registered contractors/private sale contractors are working for the particular Circle(s) Division(s), their close relatives are also posted on key posts leading to likely possibility that the officers or officials

posted in the Circle/Divisional Offices, where their relatives are executing different works for the department either in private sale or other related desks, may influence the field officers/officials to grant under favours. To eliminate any such possibility of giving undue favour/unjust award of works to relatives of officers/officials of concerned Division/Circle, it is directed that the following instructions be strictly adhered to, while registering the contractors/private sale contractors and awarding them the works of different nature:-

> "i) Before applying for registration as contractor/private sale contractor, an application should be taken from the applicant, disclosing clearly that no any officer(s)/official(s) is/are posted in the particular Circle/Division is related to him/her where he/she wishes to work as contractor/private sale contractor. The application form can also be devised in such a manner so as to include all such details. The information provided in application should also be supported/authenticated with/by an affidavit to the effect.
>
> ii) When the work is awarded to any contractor/private sale contractor, similar terms and conditions should also be incorporated in the contract agreement/work order. A contractor shall not be permitted to participate in the tender process for works from the office in which his near relative is posted in the rank of Accountant or above or as an officer in any capacity between grades of Assistant Conservator of Forests and to the level of Conservator of Forests/Chief Conservator of Forests. The contractor shall in also intimate subsequent posting of his near relative in such office if any during the course of execution of the said works. Any breach of the conditions by the contractor would render him liable to be removed from the approved list of the contractor of the Department.

It is again emphasized that above instructions may be kept in view while registering any person as contractor/private sale contractor and also while awarding the works to them and these instructions should also be conveyed to all the officers/officials working under your control for strict compliance."

7. However, that does not mean that the transfer of respondent No.3 is required to be upheld. Respondent No.3 has been transferred simply on the basis of the D.O. letter and the same is not sustainable in view of the judgment rendered by this Court in ***Sanjay Kumar*** *vs.* ***State of H.P. & Ors, Latest HLJ 2013 (HP) 1051.***

8. Interestingly, even respondent No.3 is a permanent resident of District Bilaspur being a resident of Village Challela, Post Office Nakrana, Tehsil Shree Naina Devi Ji, District Bilaspur, H.P. and was thus interested to be posted in his Home District. However, in the given

facts and circumstances, both the petitioner and 3rd respondent are not entitled to be posted in District Bilaspur.

9. Therefore, we dispose of this writ petition by directing the official respondents to transfer both the petitioner as also 3rd respondent outside their home districts within a period of two weeks from today. Pending applications, if any, also stand disposed of.

10. For compliance, to come up on 18.11.2020.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Guddu Ram .....Appellant.

Versus

State of H.P. ....Respondent.

Cr. Appeal No. 65 of 2018.
Reserved on: 28th October, 2020.
Date of Decision: 4th November,2020.

Indian Penal Code – Section 376 (2) and 506, Section 4 of POCSO Act – Minor prosecutrix while returning home was taken by the accused, being her uncle committed forcible sexual intercourse and threatened with dire consequence- accused was convicted by the Trial court – Preferred criminal appeal – Defence taken that sexual encounters between accused and prosecutrix were consensual and minority of prosecutrix challenged- Held, prosecutrix was minor and her consent is immaterial- source of birth certificate is valid if procued from govt records issued by authorized govt official while discharging his public duties – By Municipal Authorities – Or by the school leaving certificate if accompanied by all the relevant documents – In absence of above the court may rely upon ossification age determination – Appeal dismissed.Title: Guddu Ram vs. State of H.P. (D.B.) Page-251

For the Appellant: Mr. Rajneesh K. Lal, Advocate.

For the Respondent: Mr. Narender Guleria, and, Mr. Ashwani Sharma, Additional Advocates General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The accused/appellant herein, became charged for, the, commission of offences punishable, under, Section 376(2)(f), and, under Section 506 of the IPC, and, also became charged, for, commission of an offence punishable, under, Section 4 of the Protection of Children from Sexual Offences Act, 2012 (in short "POCSO" Act). The learned trial Court concerned, made an order, of, conviction, vis-a-vis, the afore charges framed, under, Section

376(2)(f) of the IPC, and, under Section 4 of the POCSO Act, and, hence, sentenced the convict, to, undergo rigorous imprisonment for a period of 14 years years, and, to pay a fine of Rs.5,000/-, for commission, of, an offence punishable under Section 376(2)(f) of the IPC, and, in default of payment of fine amount, he was sentenced to further undergo simple imprisonment for a term of one year. He was further sentenced by the learned trial Court, to, undergo rigorous imprisonment, for a period of 14 years, and, to pay a fine of Rs.5,000/-, for commission, of, an offence punishable, under, Section 4 of the POCSO Act, and, in default of payment of fine amount, he was sentenced, to, undergo simple imprisonment for one year. Both the sentences are ordered to run concurrently. However, the learned trial Court makes an order of acquittal, vis-a-vis, the charge framed, under, Section 506, of, the IPC.

2. The convict/accused/appellant herein, becomes aggrieved therefrom, hence, through, casting the extant appeal before this Court, has strived to beget reversal(s) of the afore made conviction, and, the afore consequent therewith sentence(s) hence imposed, upon him, under the afore verdict.

3. The genesis of the prosecution story, becomes, embodied in the apposite FIR, FIR whereof becomes borne in Ex.PW8/A, (i) thereins, the minor prosecutrix narrates, vis-a-vis, accused Guddu Ram, being her uncle, and, on, 14.01.2014, after, and, on, hers returning home, subsequent to hers taking examination, for 8th standard, (ii) thereat, since, she, and, the accused were alone, the latter perpetrating forcible sexual intercourse, upon, her person, (iii) and, also his intimidating her, with dire consequences, of his eliminating her, upon, hers making an intimation, of, the incident to anybody. Subsequent thereto, also, she narrates therein qua as and when, the accused finding her alone at home, his subjecting her to forcible sexual intercourse(s). The investigating Officer concerned, for ensuring the emergence, of, the best scientific evidence, for, proving the charge, against the accused, (iv) he, on FTA cards, hence collected, through, memo drawn, and, borne in Ex.PW11/E, the blood samples of, the prosecutrix, besides collected, the blood samples, on FTA card, hence also of the accused through memo borne in Ex.PW11/H, and, also collected, the, blood samples, on FTA card, through memo, embodied, in, Ex. 13/B, of, the minor, baby, of, the prosecutrix. All the afore collections, of, blood samples, on, FTA cards, of all the afore, become through, road certificate, borne in Ex.PW5/B, transmitted hence to the FSL concerned. Thereons, the DNA expert, after making the apposite inter se DNA profilings, made, an opinion, vis-a-vis, the minor baby, being born from the womb, of, the minor prosecutrix, and, hers being fathered, by the accused.

4. The afore inter se matching(s) of the afore collected blood samples, on FTA cards, respectively, of, the minor prosecutrix, of her minor baby, and, also of the accused,

unflinchingly proves the charges against the accused. The afore made apposite inter se matching(s), becomes borne, in the report of the FSL, embodied in Ex. PX.

5. Even though, in the visible, and, evident face of the prosecutrix, being a minor, and, hence, hers becoming fully incapacitated, to, under law, mete any valid consent to the accused, for his subjecting her, to repeated sexual inter course, (a) and, whereupons, the learned defence counsel's espousal, vis-a-vis, the sexual encounters, which occurred inter se the accused, and, the prosecutrix, being wholly consensual, would obviously, become rendered, an extremely emaciated espousal. Nonetheless, for enabling the learned counsel appearing for the appellant, to make, espousals, upon evidence, if any, existing on record, and, its portraying, vis-a-vis, the sexual intercourses, which occurred inter se the accused, and, the prosecutrix, being consensual, he has obviusly proceeded to scuttle the effects, of, the minority of the prosecutrix, rather at the relevant time, and, as become pronounced, in, a certificate, embodied in Ex.PW2/B.

6. Consequently, a solemn obligation is cast, upon, this Court, to, test the veracity, of, the afore submission. A perusal of Ex. PW 2/B, underscores, vis-a-vis, it being authored by the Principal, Govt. Senior Secondary School, Khunni, District Shimla, H.P., and, it also contains a narration, vis-a-vis, the date, of, admission of the child, in the afore school, and, besides thereto it also contains echoing(s), vis-a-vis, the date of birth, of, the prosecutrix, as, entered in the school records, being 25.11.1999. PW-2 stepped into the witness box, and, proved the authorship of Ex.PW2/B, and, despite an opportunity, being given to the learned defence counsel, for the accused, to tear apart the efficacy, of, Ex.PW2/B, rather he omitted to mete any suggestion to him, (I) intended towards casting aspersion(s), upon, the authorship, of, Ex.PW2/B, (ii) and, also, vis-a-vis, the appsoite recitals borne therein, being unauthentic. The trite effect thereof, is, vis-a-vis, the defence acquiescing, vis-a-vis, the valid authorship of Ex.PW2/B, and, also vis-a-vis, the veracity(ies), of, the echoings borne therein, and, appertaining, vis-a-vis, the date of birth of the prosecutrix.

7. Be that as it may, despite, the afore omission(s), becoming made by the learned defence counsel, (i) yet the learned counsel for the appellant, makes an allusion, to the deposition, occurring in the cross-examination, of, the mother of the prosecutrix, who stepped, into the witness box as PW-10, (ii) and, made echoings therein, vis-a-vis, the prosecutrix, failing twice, and, thrice, thereupon, he strives to erect a submission, that the entry of date, of, birth, of, the prosecutrix, as, borne in the school records, being false. However, the afore made argument cannot succeed, with this Court, as apart from Ex.PW2/B, the prosecution, hence, for, unflinchingly proving the date of birth, of, the prosecutrix, has made dependence, upon, her birth certificate, borne in Ex.PW3/C, (iii) wherein, there occur narration(s), hence, carrying inter

se compatibility, inter se the reflections, made therein, and, vis-a-vis, those found, in, Ex.PW2/B, (iv) and, emphatically, appertaining, to, the date of birth, of, the prosecutrix. Consequently, with there occurring inter se corroboration, in, both the afore alluded exhibits, (v) thereupon, with the best evidence, for determining, the date of birth of the prosecutrix, being the one, as become(s) embodied, in, the apposite birth certificate, rather issued by the competent authority, and, with Ex.PW3/C, falling within domains thereof, hence, a firm conclusion erupts, vis-a-vis, the prosecution fully establishing, the minority of the prosecutrix, at the relevant time, (v) thereupon, arguments, if any, as, strived to be made, by the learned counsel, appearing for the appellant, that the repeated sexual intercourses, wheretowhich, the accused subjected the prosecutrix, being wholly consensual, rather becoming thoroughly rudderless.

8. Ex.PW3/C, becomes proven by PW-3, the Secretary, of, the Gram Panchayat concerned. Even during, the course, of his being subjected to cross-examination, by the learned defence counsel, there is no suggestion meted to him, and, appertaining to the afore entries being made, not at the instance, of, the father-cum-natural guardian nor at the instance, of, the mother, of, the prosecutrix, (i) and, rather theirs being made by a person, who obviously did not hold the best knowledge, vis-a-vis, the date of birth of the prosecutrix, nor also any suggestion became meted to PW-3, and, appertaining, to, the falsity, of, authorship of Ex.PW3/C, (ii) nor subsequent to stepping into the witness box of PW-3, any application became, cast under Section 311 of the Cr.P.C., by the defence, before the learned trial Court, for, seeking the latter's permission, to ensure production of, all contemporaneous records, appertaining to makings, of, Ex.PW3/C, (ii) and, theirs suggesting, vis-a-vis, in contemporaneity, vis-a-vis, the making of Ex.PW3/C, neither the father-cum-natural guardian of the prosecutrix, and, nor her mother, though, holding the best knowledge, vis-a-vis, the date of birth of the prosecutrix, making any firm intimation qua therewith, through a scribed application made therebefore, nor hence obviously any application made before the Secretary, Panchayat concerned, became strived to be adduced, (iii) nor any affidavit, vis-a-vis, the date of birth of the prosecutrix, and, as, accompanying the afore scribed application, as, made by the father or the mother before the Secretary, Panchayat concerned, become assayed, hence, came to be adduced, (iv) besides, the hospital records, contemporaneous to the making of Ex.PW3/C, if the prosecutrix was born, in, a hospital, remained unadduced, for theirs displaying, the reflections qua her date of birth, as occur in Ex.PW3/C, bearing harmony or disharmony, therewith. All the afore recoursings, obviously constituted vigorous potent rebuttal evidence, for belying the afore reflections, and, only upon theirs being adduced, they would constitute the firmest rebuttal evidence, for, displacing the vigour, of, Ex.PW3/C. However, they remained unrecoursed. Cumulatively, the,

effects, of, the afore visible waivers, and, abandonments, by the learned defence counsel, before the learned trial Court, for therethroughs, his assaying to rip apart, the efficacy, of, Ex.PW3/C, does obviously, (v) boost a conclusion, qua the defence acquiescing, vis-a-vis, the reflections, made in Ex.PW2/B, and, in Ex.PW3/C, and, appertaining to the date of birth of the prosecutrix, being obviously incorporated, in tandem with the scribings, as made, by her parents, before, the Panchayat concerned, and, , for wants, of, efficacious erosions thereof(s), through, adduction(s), of, the afore best rebuttal evidence, thereupon(s) the reflections carried in Ex.PW3/C, enjoy an, aura of conclusive truthfulness.

9. Even though, the mother of the prosecutrix, has deposed, vis-a-vis, the prosecutrix failing twice and thrice. However, solitarily therefrom, eminently, in the absence of the afore valid recorusing(s) being made, by the learned defence counsel, before the learned trial court, for, therethrough, strivings being made to benumb the validity, and, efficacy, of, the entries, of, date of birth of the prosecutrix, as, become borne in Ex.PW3/C, rather any placing(s), of, reliance(s) thereon, would be extremely frail, inasmuch, as, (i) and more so, even if, it hold(s) truthfulness, and, veracity, yet the afore bald suggestion, would not facilitate the making, of, any inference leaning towards the accused, especially when the apposite records, as, available with the school concerned, and, theirs maybe making bespeakings, in consonance with the afore, rather remaining unadduced in evidence, (ii) and, also with the prosecutrix as also her father, in their respective cross-examinations, denying the afore factum.

10. The source of the birth certificate, is, a valid source, inasmuch, as, it emanates from the Government records, (i) and, only upon, the authorship of the birth certificate, becoming proven by adduction, of, best evidence, qua therewith, rather to be false, (ii) or, upon, contemporaneous records accompanying an application, if any, made before the Secretary, Gram Panchayat concerned, for, an entry of the date of birth, of, prosecutrix being incorporated, in, the panchayat records, and, upon each becoming adduced into evidence, rather theirs completely, belying the entries, vis-a-vis, the date of birth of the prosecutrix, as, embodied in ex.PW3/C, thereupon, alone, a completest aura of doubt,w ould, engulf the afore factum. The Secretary, Panchayat, is, an authorised government official, to make entries in the Panchayat records, appertaining to recordings, of, date of birth(s), and, of, death(s), of, denizens, as, occur in the Mohal, or/and, Village concerned, and, in making the afore entries, he perform(s) public duties. The making of the afore entries, in the discharge, and, performance, of public duties, by a pubic official, does immediately, on incorporation(s), of, the apposite date of birth, in the records concerned, by the competent officer, be it, in the Panchayat records, and/or, in Municipal records, does attract thereto, hence, the mandate, as, becomes borne, in Section 35, of, the Indian Evidence Act, provision(s) whereof, stand extracted hereinafter:-

> "**35. Relevancy of entry in public 1[record or an electronic record] made in performance of duty**.—An entry in any public or other official book, register or 1[record or an electronic record], stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or 1[record or an electronic record] is kept, is itself a relevant fact."

and though the afore presumption, is, rebuttable, (ii) reiteratedly, and, re-emphasisingly, hence, obviously adduction of, cogent rebuttal evidence, to rip the efficacy, of, the afore presumption, rather became, a, dire statutory necessity. As aforestated, neither in the cross-examination, either of PW-2 or of PW-3, any of the afore suggestion(s), for, therethrough the defence attempting, to, repel, the afore presumption, of, truth, carried by Ex.PW3/C, became meted to each of them, (iii) nor as aforestated any endeavour was made by the defence, even on completion, of, the making(s), of, the deposition of PW-3, hence, before the learned trial Court, to, through availment, of, the provisions, of Section 311 of the Cr.P.C., seek permission(s)/leave qua therewiths, becoming granted by the learned trial Court, or to, ensure adduction of best cogent evidence, for, falsifying, the, signatures, of, the author of Ex.PW3/C, (iv) and, reiteratedly for belying, the factum, of, an affidavit becoming appended with the apposite application, being, preferred, by the mother or father of the prosecutrix, before the Secretary, Panchayat, hence for, incorporating the afore entries, (v) and/or, ensuring therethrough(s), the adduction, of, the apposite application, if any, as, made for the afore purpose, before the Secretary Panchayat, by the mother or by the father of the minor prosecutrix, and, it becoming accompanied, by the apposite hospital records, if the minor was born thereat, (vi) or for ensuring the adduction, of, the apposite application, as, made before the Secretary concerned, and, its hence making or not making corroboration(s) with the afore, entries. Reiteratedly, in the absence, of, adduction, of, all the afore cogent rebuttal evidence, rather before the learned trial court, through availment(s), of, either of the afore mechanism(s), does constrain, a conclusion from this court, (vii) that the rebuttable presumption of truth, enjoyed by Ex.PW3/C, and, engendering from, its becoming prepared, in the discharge of public duties, by a public servant, (viii) hence obviously for want, of, adduction, of, cogent rebuttal evidence thereto, rather assuming conclusive truthfulness, and, thereupons, completest sanctity, becoming, enjoined to be meted thereto. The preponderant reason, for, unflinchingly making the afore reason, becomes aroused, from the factum, of, the father of the prosecutrix, in his deposition, comprised in his cross-examination, making an admission, vis-a-vis, his entering the date of birth, of, the minor prosecutrix, in, the Panchayat record(s)..

11. However, at this stage, the learned counsel appearing for the appellant, for tearing apart, the efficacy of the apposite date of birth, as becomes reflected, in Ex.PW2/B, and, in Ex.PW3/C, places reliances, upon, various verdicts rendered, by the Hon'ble Apex Court, and, by other various High Courts and, by this Court, in cases titled, as, Ravinder Singh Gorkhi vs. State of U.P., reported in (2006)5, SCC 584, in a case titled as Ramesh Sharma, vs. State of H.P., reported 2013 (3) SCC 1386, in case case titled, as, Ramesh Soni vs. State of H.P., reported in 2014(2), Him. L. R. 1283, and, G. Parshwanath v. State of Karnataka, AIR 2010, SC, 2914. However, none of the verdicts (supra) are applicable to the facts of the case in hand, (i) inasmuch as, all the verdicts (supra), appertain to the entries of date of birth, of, the prosecutrix, being embodied in apposite school leaving certificate(s), (ii) and, when the latter, does not, comprise the best evidence qua date of birth of the prosecutrix, rather the best cogent evidence, vis-a-vis, the date of birth, is, the one carried, in, the birth certificate issued, by the competent authority, (iii) thereupon, all the verdicts (supra) are inapplicable, and, discardable, and, do not carry forwards, the endeavour of the learned counsel appearing, for, the appellant, to falsify the entries, appertaining to the date of birth of the prosecutrix, and, as, become embodied in Ex.PW3/C, exhibit whereof, is, a validly scribed birth certificate, of, the prosecutrix. Even otherwise, all the afore verdicts, would become squarely attracted, vis-a-vis, espousal(s) of the learned counsel, appearing for the appellant, only, upon, firmest evidence, in consonance therewith, existing either in the cross-examination of PW-3, who proved, and, tendered Ex.PW3/C, and, also upon suggestion(s) being meted, to the father of the prosecutrix, who rather admits in his cross-examination, vis-a-vis, his recording the date of the prosecutrix, in the records, of, the Panchayat concerned, for, therefrom(s), ensuring qua his making rather echoings, vis-a-vis, his making the afore entry, vaguely, and, surmisely, (iv) besides upon the defence, through adducing, all the record(s) contemporaneous, to, the recording of the date of birth, of, the prosecutrix, in, the panchyat records, theirs evincing proof, in negation, of, echoings, carried in Ex.PW3/C, and, in support, of, echoings occurring, in, the cross-examination of the mother of the prosecutrix, vis-a-vis, the prosecutrix failing twice and thrice. However, most emphasisingly, none of the afore endeavours became recoursed by the defence, thereupon, this Court concludes, vis-a-vis, Ex. PW3/C, carrying truthful narrations, vis-a-vis, the date of birth of the prosecutrix. The corollary thereof, is, vis-a-vis, the endeavour of the learned counsel, for the appellant, to rely upon the echoings, if any, borne in the testification, of, the prosecutrix, and, theirs being suggestive, vis-a-vis, penal sexual acts, being wholly consensual, being a completely mis-recoursed, and, also a futile endeavour.

12. In summa, this court concludes, that, the best evidence, for, proving the date of birth of the prosecutrix, becoming comprised (i) in the birth certificate, as, issued by the

Secretary, Gram Panchayat concerned, (ii) or by the Municipal Authorities concerned, and, both the afore become, the valid custodian(s), of, the records appertaining, to the date of birth of the prosecutrix, (iii) and, upon, the, officials working thereat or authors thereof, upon, theirs stepping into the witness box, theirs hence proving the birth certificate, (iv) thereupon, the learned trial Courts, being enjoined to emboss thereon(s) exhibition marks, and, also becoming enjoined, to place implicit reliance thereon, for, determining, therefrom hence the date of birth of the prosecutrix. The entries, of, the date of birth, of, the prosecutrix, as, made by the Secretary of the Panchayat concerned, or by the Municipal authorities concerned, being construable, to be, made in the discharge, of, their apposite official functions, hence, as, mandated, in Section 35 of the Indian Evidence Act, a presumption of truth is attached, to the making, of, the afore entries, however, the afore presumption of truth, is, a rebuttable presumption, and, unless, the afore presumption is rebutted through (a) proven falsity of the signatures of the author of the entries; (b) the entry, of, date of birth therein being surmisal, inasmuch, as, no valid scribings qua therewith being purveyed by the natural guardian or by the father of the prosecutrix, to the official concerned; (c) hospital records, if any, required for making the afore entries, remaining untendered, before the authority(ies) concerned, however, only if, the prosecutrix, has taken birth in a hospital, otherwise not, thereupon, the afore acquiring absolutest conclusivity. In case, the birth certificate, is sourced, from the afore valid sources, and,l if the afore rebuttable evidence is not adduced, thereupon, the courts becoming coaxed, to believe, the veracity of the disclosures as made, therein, vis-a-vis, the apposite date of birth. In the absence of the afore evidence, the school leaving certificate, as, issued by the school concerned, being a valid source, for proving the date of birth of the prosecutrix, if accompanied by an application, of the mother of the prosecutrix or of the father of the prosecutrix, as also, if accompanied, by an affidavit, reflecting therein the date of birth, of, the prosecutrix. In the absence of both the afore evidence(s), the courts, may rely, upon, radiological age determination(s) or upon ossification age determination(s), of the prosecutrix.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence, on record, in a wholesome and harmonious manner, and, the analysis thereof, by the learned trial Court, hence does not suffer, from, any perversity or absurdity of mis-appreciation and non-appreciation, of evidence, on record.

14. Consequently, there is no merit in the extant appeal, and, it is dismissed accordingly. The impugned judgment is maintained, and, affirmed. All pending applications also stand disposed of. The records be sent down forthwith.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, JUDGE AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, JUDGE

Madan Lal ...Appellant.

VERSUS

State of H.P. ...Respondent.

Cr. Appeal No. 88 of 2020.
Reserved on:29th October, 2020.
Decided on: 4th November, 2020.

Narcotic Drugs and Psychotropic Substances Act – Sections 18,20 and 29 – Section 39 of H.P. Excise Act – Accused Madan Lal was found in exclusive and conscious possession of 1800 gms of Charas and 50 gms of opium from his residential premises - Accused convicted by the Trial Court- Cr. appeal preferred before Hon'ble High Court – Held, that the case property was proved to be untampered and intact – Independent witnesses admitted their authentic signatures during cross examination – No evidence was found that independent witnesses were coerced or pressurized for signatures – Mandate of Sections 91 & 92 Indian Evidence, Act attracted barring independent witness to orally resile from the contents of recovery memos– Accused Madan Lal failing to discharge the onus to explain apposite possession at the relevant time presumption under section 54 ND&PS Act drawn against him –Possession from where the recovery was made found in the name of mother of convict- case of the prosecution is duly proved – Appeal dismissed.

Case referred:
Jeet Ram versus the Narcotics Control Bureau, Chandigarh in Criminal Appeal No. 688 of 2013;

For the Appellant: Mr. G.R. Palsra, Advocate.

For the Respondent: Mr. Hemant Vaid, and, Mr. Ashwani Sharma,, Addl.A.Gs., with Mr. Vikrant Chandel, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Through an order made on 4.07.2016, the learned Special Judge, Ghumarwin, District Bilaspur, H.P., framed charges against Madan Lal, vis-a-vis, offence(s) constituted under Section 20, of, the Narcotic Drugs and Psychotropic Substances Act, and, read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act. Moreover, through, the afore made order, the learned trial Court also framed a charge against accused Madan Lal, for his committing, an, offence punishable, under, Section 18 of the Narcotic Drugs and Psychotropic Substances Act, besides through, the afore made order, the learned trial Court

also framed a charge against accused Madan Lal, for his committing an offence punishable, under, Section 39 of the Himachal Pradesh Excise Act, inasmuch, as, for his being found in exclusive and conscious possession, of, 24 bottles of English liquor, Marked Ginnies Fine Whisky. Moreover, the learned trial Court framed a charge on 4.7.2016, vis-a-vis, accused Praveen Kumar, for his committing, an offence punishable, under, Section 20 of the Narcotic Drugs, and, Psychotropic Substances Act, read with Section 29 thereto, and, in addition, through an order made, on 4.7.2016, the learned trial Court, framed a charge against accused Lal Chand, for his committing, an offence punishable, under, Section 18, and, under Section 29, of, the Narcotic Drugs and Psychotropic Substances Act. However, through a verdict made on 22.10.2019, upon, Sessions Trial No. 3-3 of 2016, the learned trial Court, made an order of acquittal, vis-a-vis, co-accused Praveen Kumar, and, also, vis-a-vis, co-accused Lal Chand, vis-a-vis, the afore drawn charges against them, and, also the learned trial Court, through the afore verdict, made an order of acquittal, upon, accused Madan Lal, for the charge, drawn, under, Section 29, of, the Narcotic Drugs, and, Psychotropic Substances Act, and, also for the charge drawn, under, Section 39, of, the Himachal Pradesh Excise Act, 2011. However, under the afore verdict, accused/convict Madan Lal, became convicted, for commission of offences punishable under Section 18(c), and, under Section 20(ii) (c), of, the Narcotic Drugs and Psychotropic Substances Act. The learned trial Court imposed, upon, him sentence, of, rigorous imprisonment, hence, extending upto 10 years, and, also sentenced him, to pay a fine of Rs. One lakh, and, in default of payment of fine amount, he was sentenced to undergo rigorous imprisonment, for one year, for, commission of an offence punishable, under, Section 20(c) of the Narcotic Drugs and Psychotropic Substances Act. He was further sentenced to undergo rigorous imprisonment, for a term of two years, and, to pay a fine of Rs.10,000/-, and, in default of payment, of, fine amount, he was further sentenced, to undergo rigorous imprisonment for one year, for commission, of, an offence punishable under Section 18(C), of, the Narcotic Drugs and Psychotropic Substances Act. All the afore sentences become ordered to run concurrently.

2. Obviously, convict Madan Lal becomes aggrieved, from the afore made verdict, of,conviction, upon, him, vis-a-vis, the afore charges, and, also obviously becomes aggrieved, from the afore order, imposing, upon, him, the afore alluded sentences, of, imprisonment, and, of fine, and, hence becomes constrained to, thereagainst, constitute an appeal, before this Court.

3. Through memo, borne in Ex. PW3/A, the Investigating Officer, made recoveries of 100 grams, of, charas, from the person of co-accused Madan Lal, hence as echoed therein, from, his keeping it, in the pocket(s), of, his shirt, as, became, worn by him, at the relevant time.

However, the Investigating Officer concerned, did not, prior thereto, elicit, the, mandatorily enjoined consent, from him, for his, valid personal search being conducted, by him, hence through, a, memo drawn by him. Since, the elicitation of the apposite consent, from co-accused Madan Lal, for his valid personal search, being made, by the investigating officer, became a dire statutory necessity, inasmuch, as, the recovery of contraband, weighing 100 grams, of, cannabis, became recovered, from his person, hence, through, a, memo borne in Ex.PW3/A, (i) whereas, visibly, with the Investigating Officer, rather not drawing, the apposite memo, seeking therethrough, the, statutorily ordained mandatory consent, of, co-accused Madan Lal, for, hence, facilitating him, to carry search, of his person, for rather therethrough(s) hence validity becoming foisted, to the recovery, of, cannabis, weighing 100 grams, from the pocket of the shirt, worn, by co-accused Madan Lal, at the relevant time, rather does fully whittle the efficacy, of drawings, of, Ex.PW3/A. Moreover, contrarily, with the Investigating Officer rather drawing a consent memo, vis-a-vis, co-accused Praveen Kumar, and, also his eliciting, the, consent of the afore co-accused, obviously bringforths, a, blatant breach, becoming committed, vis-a-vis, the statutory mandatory provisions, engrafted in Section 50, of, the Narcotic Drugs and Psychotropic Substances Act, (ii) besides makes candid display, of, the thorough non application of mind, and, of course, of, the slip shod manner of Investigations, being made by the Investigating Officer, into the relevant offences. Obviously, sequel thereof, is, as aptly concluded by the learned trial Court, vis-a-vis, an order of acquittal, becoming, amenable, to become pronounced, vis-a-vis, recovery of 100 grams, of, charas, as, became effectuated, from, the purported person, of, accused Madan Lal, through, memo borne, in Ex.PW3/A.

4. Be that as it may, co-accused Madan Lal, through memo Ex.PW3/C, stood arrested, at the site of occurrence, by the Investigating Officer. In spontaneity to the Investigating Officer, through memo Ex.PW3/C, hence arresting co-accused Madan Lal, he through memo drawn Ex.PW3/E, made interrogations, upon, co-accused Madan Lal, hence therethough elicited from him, inculpatory confession(s), vis-a-vis, his apart, from the recovery, of, charas, effectuated, through memo Ex.PW3/A, his also hiding, and, camouflaging contraband, hence, at his residence. The afore inculpatory disclosure(s) made, during, the interrogation, of, co-accused Madan Lal, and, as, embodied in Ex.PW3/E, hence, obviously render Ex.PW3/E, to, become construable, to, be a valid inculpatory statement, drawn under Section 27, of, the Indian Evidence Act. The witnesses, to, the drawings, of, Ex.PW3/E, are one Roshan Lal, and, one LHC Sanjeev Kumar, No. 455, both of whom testify, vis-a-vis, veracities, of, all recitals, borne therein, and, thereupon, they prove the validity, of makings, of, Ex.PW3/E. In pursuance to the Investigating Officer, drawing the afore memo, under Section 27, of, the Indian Evidence Act, and, as becomes borne in Ex. PW3/E,, and, as became uncontrovertedly

signatured, by the accused, and, also by the witnesses thereto, he, as evinced by Ex.PW2/A, became led by co-accused Madan Lal, to his residential premises, and, wherefrom 1800 grams of charas, and, 50 grams, of, opium, became recovered from an Attachi case, and, also therein became enclosed, the, recovered therefroms currency notes, carrying, a, value of Rs. 1.67,400/-.

5. A perusal of Ex.PW2/A underscores, vis-a-vis, at the site, whereat Ex.PW2/A became prepared, the Investigating Officer enclosing 1800 grams, of, charas, in a plastic bag, and, thereafter his enclosing, it, in a cloth parcel, and, thereons, his embossing 4 seal impressions, carrying English alphabet "H", (i) besides his drawing samples, of seals, on cloth parcel. Moreover, Ex.PW2/A also makes graphic underlining(s), vis-a-vis, therethrough, recovery, of, charas, hence becoming effectuated, from, an attachi case, found inside the house of the accused, wheretowhich, the accused in pursuance, to his, making a valid disclosure statement, under Section 27, of, the Indian Evidence, as, borne in Ex.PW3/E, rather led the Investigating Officer, and, also therefrom, recoveries, becoming effectuated, of, opium, hence by the Investigating Officer. The Investigating Officer, in contemporaneity, vis-a-vis, his drawing Ex.PW2/A, he re-enclosed opium in a plastic bag, wherefrom it became retrieved, and, he thereafter re-enclosed it, in a cloth parcel, and, thereon he embossed four seal impressions, of, English alphabet "H". NCB form borne in Ex.PW4/E, appertaining to the recovery, of, charas weighing 1800 grams, and, NCB form, borne in Ex.PW4/F, appertaining to the recovery, of, opium, weighing 50 gram, both became prepared at the site, of, occurrence. A perusal of the NCB form, borne in Ex.PW4/E, and, appertaining to the recovery of charas, weighing 1800 grams, and, of NCB form, borne in Ex.PW4/F, and, appertaining to the recovery of opium, weighing 50 grams, (ii) underscores, vis-a-vis, all the description(s) qua the numbers of seal impressions, and, of English Alphabet occurring thereons, bearing compatibility, vis-a-vis, the narrations qua therewith hence occurring in Ex. PW2/A. Both, opium, weighing 50 grams, and, charas weighing 1800 grams, recoveries whereof, become made through a common memo, borne in Ex.PW2/A, became transmitted, to the police station concerned, and, a perusal of the NCB forms, as, drawn qua therewith, and, respectively borne, in, Ex.PW 14/E, and, Ex.PW14/F, make(s) disclosures, vis-a-vis, thereons, the SHO of the Police Station concerned, embossing thereat, re-seal, seal impression, and, each carrying thereon English Alphabet "T". Both the apposite recovered parcels, respectively containing 1800 grams of charas, and, 50 grams of opium, after their re-sealing, being made at the police station concerned by the SHO concerned, became deposited with the Incharge, of, the Malkhana concerned, and, a perusal of the abstract, of, the Malkhana register,borne in Ex.PW15/A, makes clear upsurgings, vis-a-vis, thereat, also occurring all afore congruities, and, compatibilities, inter se the number(s) of seal impressions, and, of re-seal, seal impressions, as, borne in recovery memo, embodied in

Ex.PW2/A, and, vis-a-vis, both the NCB form(s), respectively borne in Ex.PW4/E, and, in Ex.PW4/F, (iii) and, emphatically appertaining to the numbers of seal impressions, as, initially made on the cloth parcels, and, also vis-a-vis, the re-seal, seal impressions, as, made thereon(s), rather all bearing visible synchronization(s), and, compatibilities with respect to the number(s) thereof, and, also with respect, to, the embossings, thereons, of English alphabet(s), as, become pronounced, in all the afore drawn memos.

6. Through road certificate, borne in Ex.PW15/B, the case property, stood transmitted, to the FSL concerned, and, upon, the contents, of, the afore apposite cloth parcels, becoming examined thereat, by the Chemical Examiner hence working thereat, as apparent, on a reading of Ex.PW21/W, he made, an opinion, vis-a-vis, the charas, as enclosed, in the cloth parcel concerned, and, also vis-a-vis, the opium, as became enclosed, in a cloth parcel, after each becoming retrieved therefroms, for, analysis, qua their contents being respectively found, to be, of, charas, and, of, opium. Apart from the above, for, the purpose of determining, the, potency, of, existence, of, the afore alluded synchronization(s), and, compatibilities, vis-a-vis, afore prima donna factum probandum, the, extraction of paragraph No. 7 of Ex.PW21/W is imperative, paragraph whereof, reads, as under:-

> "7. Description of parcel: one sealed cloth parcel, marked in the laboratory as A bearing five seals of "S", and five seals of "T", two sealed cloth parcels marked in the laboratory as B & C, each bearing four seals of "H" and four seals of "T". The seals were found intact and tallied with specimen seals sent by the forwarding authority and seals impression impressed on the forms NCB-1. The parcels were kept in safe custody of the Assistant Chemical Examiner till the report of the same was signed and dispatched.

A perusal thereof, underscores, vis-a-vis, upon, receipt of the apposite cloth parcels, at the laboratory concerned, both carrying thereon(s) analogus descriptions appertaining, to the number(s) of seal impressions, and, of re-seal, seal impressions, and, also, vis-a-vis, the, respectively made English Alaphabet(s) thereons, or rather all bearing synchronization(s), vis-a-vis, the description(s) as made qua therewith, in Ex.PW2/A, and, in the apposite NCB forms, respectively, borne in Ex.PW4/E, and, in Ex.PW4/F. Furthermore, the effect(s), of, existence(s), of, the afore congruities, and, compatibilities, and, as become unfolded, through a reading, of, paragraph No.7, of, Ex.PW21/W, is, qua theirs underscoring, an unflinching conclusion, vis-a-vis, the case property, travelling from the Malkhana, of the Police Station concerned, upto, the FSL concerned, in an untampered condition. Moreover, a perusal of Ex.PW21/w, underscores, vis-a-vis, the chemical analyst concerned, after re-enclosing, in the cloth parcels, the relevant contraband(s), after his making analysis thereof, his embossing thereons, seals of the FSL concerned, and, his returning them, to the Malkahana, hence, existing at the police station

concerned. It was from the Malkhana, of, the police station concerned, that the case property(ies), became produced, before the learned trial court concerned.

7. Be that as it may, even at the stage contemporaneous, to the production, of, the case property, in court, thereat also, it enjoined, qua its carrying, all the afore alluded apposite analogities, and, similarities, and, in case, in contemporaneity, vis-a-vis, the production, of, the case property, before the learned trial court, the afore analogities, and, similarities, remain intact, thereupon, this Court, would become coaxed, to conclude, that the prosecution, has been able to prove the guilt of the accused, beyond all reasonable doubts.

8. For fathoming, the afore factum, a reading of the court observations, as, made by the learned trial Court, during, the course, of, the examination-in-chief of PW-3, is imperative. A reading whereof, makes palpable disclosure, vis-a-vis, the initially made seals impressions, on the respective cloth parcels, appertaining, to, numbers thereof, and, also appertaining, to, English Alphabets, made thereon(s), (a) and, besides qua re-seal, seal impressions, made thereon(s), by the SHO concerned, both in respect of numbers thereof, and, also in respect of English Alphabet(s), as, made thereon(s), (b) and, in addition, the, re-seal, seal impressions, of the FSL concerned, as made thereon, all becoming found existing thereon(s), and, all the seals, also being found, to, be untampered, and, intact. The afore made court observations, remained uncontested, by the learned defence counsel, inasmuch, he did not object, to, the veracity of the afore made court observations. Consequently, the learned counsel, appearing for the appellant, cannot contend, that either all the afore apposite analogities and compatibilities, not existing in contemporaneity, vis-a-vis, the production, of, the case property in court, (c) and, also cannot contend, vis-a-vis, the seal impressions or re-seal, seal impressions, being tampered, (d) especially when the learned trial court has made observations, vis-a-vis, theirs being untampered, and, intact. The sequel thereof, is, vis-a-vis, the imperative link, as, commencing, from the recovery of the contraband, as, made, from the exclusive, and, conscious possession, of, the accused, at the site of occurrence, hence through seizure memo borne in Ex.PW2/A, remaining alive, and, subsisting even during the course, of, production, of, the case property in court, thereupon, the charge becoming invincibly proven against the accused.

9. However, nowat, the effect, of, independent witnesses, to, the drawing, of, recovery memo Ext.PW-2/A, reneging from their respectively made previous statement(s) in writing, is, to be construed alongwith, the factum of theirs, in their respective cross-examination(s), whereto they became subjected, to, by the learned Public Prosecutor, “on” theirs, standing declared hostile, hence admitting the factum of their authentic signatures, rather occurring thereon. Consequently, when they admit the occurrence, of their, authentic

signatures, on the relevant memo(s), and, also upon the cloth parcels, hence containing therewithin(s), the recovered contraband, (a) thereupon the mandate of Section 91 and 92 of the Indian Evidence Act, becomes attracted, (i) whereupon they "on" admitting, the, occurrence(s), of, their signatures thereon, hence become statutorily estopped to renege, from, all the recital(s) borne therein(s), (ii) thereupon the effect of their orally deposing in variance or in detraction, of, the recitals which occur therein, rather gets statutorily belittled, (iii) rather when they naturally hence emphatically statutorily, prove(s) all the recitals, comprised, in, the apposite memo(s), (iv) thereupon theirs orally reneging, from, the recitals borne thereon "holds no evidentiary clout" nor it is legally apt to outweigh, the creditworthiness of the testimony(s), of, the official witnesses, qua the recovery of contraband, hence, made, through, recovery memo Ext. PW2/A, and, its making bespeaking(s), qua its standing effectuated, from, the conscious and exclusive possession, of, the accused. In sequel, the uncontroverted factum, of their authentic signatures, occurring on the relevant exhibits, rather containing therewithin(s), the, recovered contraband, concomitantly renders the apposite recitals borne thereon(s) rather to hold, the, gravest probative worth. The ensuing sequel thereof, is that with the statutory estoppel constituted in Sections 91 and 92 of the Indian Evidence Act, barring, the, independent witnesses' concerned, to orally resile, from, the contents of Ext.PW-2/A, (v) especially when they admit qua their authentic signatures occurring thereon, rather renders unworthwhile besides insignificant, the factum qua their orally deposing, in variance, vis-à-vis, its recorded recitals, (vi) thereupon per se an inference, stands enhanced, qua dehors theirs reneging from their previous statement(s) recorded in writing, rather a, deduction(s) standing capitalized qua thereupon their rather proving the genesis, of, the prosecution case.

10. Be that as it may, the vigour of the aforesaid conclusion, would stand benumbed, only upon evidence existing on record, with respect to the independent witnesses concerned, standing pressurized or coerced, by the Investigating Officer concerned, "to" emboss their signatures, upon, seizure memo Ext.PW-2/A. However, the independent witnesses concerned, through their testification(s), make an attempt to communicate, that, their signatures, as, borne thereon(s), rather becoming obtained, despite, contents thereof, being not read over to them, yet, the aforesaid communication, "is bereft of any vigour", especially when they "do not" make, any unveilings in their respective testification(s), (i) that, in the Investigating Officer concerned, purportedly omitting to read over to them, the contents, of, the aforesaid exhibits, "besides", hence theirs obviously without understanding their contents, theirs appending their signatures thereon, and, hence the embossing(s) thereon(s), of, their signatures, "hence spurring", from compulsion or duress, standing exerted upon them, by the Investigating Officer, (ii) whereas, "importantly" omissions thereof(s), and, also when in respect

thereof, they omitted to record a complaint, with the Officer(s) superior, to, the Investigating Officer concerned, rather begets an inference, vis-a-vis, the effect of the aforesaid communications, occurring in the testification(s), of, the independent witnesses, hence, naturally not, belittling the hereinabove drawn inference, anvilled upon attraction, "upon" the admitted factum, of their authentic signatures, hence occurring, on Ext.PW-2/A, rather "the" mandate of Section 91 and 92, of, the Indian Evidence Act, (iii) thereupon dehors their making the aforesaid, frail attempt(s), rather for belying the recitals, borne in Ext.PW-2/A, theirs rather hence statutorily proving, all the recitals occurring therein.

11. Even though, all the afore imperative links become unflinchingly established, by the prosecution, and, as commencing from the recovery, as made at the site of occurrence, and, upto the production of the case property in Court. Nonetheless, the learned counsel appearing for the accused, makes a vehement submission before this Court, qua with Sanjeev Kumar making a deposition, in his cross-examination, and, his underscoring therein, vis-a-vis, despite the availability of independent witnesses, in proximity, to the relevant site of occurrence, yet, none of them becoming joined, in the relevant proceedings, (a) hence per se, thereupon, the relevant investigations, being construed, to be made with an oblique motive, and, also being construable to be unworthy, of any credibility, being imputed thereto. However, the afore submission is, rejected, as, unless the afore similarities, and, congruities, and, appertaining to the afore factum probandum, being de-established, thereupon, they alone prove the guilt of the accused, dehors non association, of, independent witnesses, despite their easy availability. However, since, all the afore imperative links in the prosecution case, became cogently established, and, emphatically, when all the afore links, remain intact, right from the seizure being made, of, the case property, at the site of occurrence, and, upto their production in court, thereupon, non association of the independent witnesses, is not imperative, nor in their non association in the investigations, hence, the Investigating Officer, can be held to be holding any slanted investigations, into, the afore offences.

12. The learned counsel appearing for the accused/convict has submitted before this court, that no reliance can be placed, upon, the abstract of malkhana register, borne in ex.PW15/A, as, it does not carry the signatures, of the Incharge, of, the Malkhana concerned, and, essentially against the entries made, vis-a-vis, the case property. However, the afore submission, cannot carry any weight, as, the Incharge of the Malkhana, stepped into the witnesses box as PW-15, and, produced the original Malkhana register, before the trial Court, and, has efficaciously proven the relevant abstract, of, Malkhana Register, borne in Ex.PW15/A, and, also has ensured the makings, of, exhibit marks thereon. The effect thereof is that since PW-15, is, the custodian of the Malkhana register, and, obviously when, upon, the original

Malkhana Register becoming produced in Court, by its valid custodian, hence, the scribings thereins, vis-a-vis, the descriptions of the case property, cannot become construable to be either forged or factiously drawn, unless suggestion qua therewith became meted to PW-15, by the learned defence counsel, upon, his holding him to cross-examination. However, none of the afore suggestions, become meted to PW-15, by the learned defence counsel, during, the course of his subjecting, PW-15 to cross-examination, thereupon, dehors, any signatures being not made against the description, of the case property, hence, in the Malkhana Register, would not falsify the afore made entries occurring therein(s).

13. Lastly, the learned counsel appearing for the appellant, submits that the relevant premises wherefrom recoveries, were made, through, Ex.PW2/A, is not owned by the appellant, rather it, in the relevant records, stands recorded in the name of his mother, thereupon, all the recitals, borne in Ex.PW2/A, become per se falsified. However, the afore submission as made before this court, cannot be accepted, as, the recovery of the afore contraband, from, the residential house of the accused is made through memo Ex.PW2/A, in the presence of independent witnesses thereto, and, their undisputed signatures also occur on Ex.PW2/A. Moreover, also all the afore proven link evidence(s), belies the merit, if any, of the afore made submissions, before this Court. Paramountly, the Hon'ble Apex Court, in a judgment, rendered in case titled, as "**Jeet Ram versus the Narcotics Control Bureau, Chandigarh**, in Criminal Appeal No. 688 of 2013, making an expostulation, of, law, vis-à-vis, the apt onus, becoming cast upon the convict, to explain, the, apposite possession, of, the relevant premises, at the relevant time, and upon failure, of, his discharging the afore onus, as, has happened hereat, (i) thereupon, the presumption, borne in Section 54, of, the ND & PS Act, becoming drawn against him, does also, de-facilitate(s), the counsel for the convict to make the afore address, rather this Court, is, constrained to infer qua the convict, being in possession, of, the relevant premises, hence, at the relevant time.

14. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence, on record, in a wholesome and harmonious manner, and, the analysis thereof, by the learned trial Court, hence does not suffer, from, a perversity or absurdity of mis-appreciation and non-appreciation, of evidence, on record.

15. Consequently, there is no merit in the extant appeal, and, it is dismissed accordingly. The judgment impugned before this Court is maintained and affirmed. All pending applications also stand disposed of. The records be sent down forthwith.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Sumit Sharma .....Appellant.
Versus
State of H.P. ....Respondent.

Cr. Appeal No. 490 of 2019.
Reserved on: 29th October, 2020.
Date of Decision: 4thNovember, 2020.

Indian Penal Code – Section 376(2) (f)(n) – Section 6 of POCSO Act – Complaint made by the father of the victim as she was found pregnant during medical examination conducted by private practitioners, it was disclosed by the victim that she was subjected to repeated forcible sexual intercourse by the accused and was criminally intimidated – Trial court convicted the accused - Appeal preferred before the Hon'ble High Court- It was held that the scientific evidence, report of FSL established that the baby of minor victim belongs to accused –Held, that birth certificate of minor victim issued by Secretary, Gram Panchayat concerned not rebutted – Presumption of truth attached to the section u/s 35 of Indian Evidence Act establishing minority of victim at the time of commission of offence – No evidence of consensual act as victim is minor - case stood proved and accused rightly convicted – Appeal dismissed.

For the Appellant: Mr. Manoj Pathak, Advocate.

For the Respondent: Mr. Hemant Vaid, and, Mr. Ashwani Sharma, Addl. Advocates General with Mr. Vikrant Chandel, Dy. A.Gs.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The accused/appellant herein, became charged for, the, commission of an offence punishable, under, Section 376(2)(f)(n) of the IPC, and, also became charged, for, commission of an offence punishable, under, Section 6 of the Protection of Children from Sexual Offences Act, 2012 (in short "POCSO" Act). The learned trial Court concerned, made an order of conviction, vis-a-vis, the afore charged offences, and, also sentenced the convict, to, undergo simple imprisonment for a period of 10 years, and, to pay a fine of Rs.10,000/-, for commission, of, offences punishable under Section 376 (2)(f)(n) of the IPC, and, under, Section 6 of the POCSO Act, and, in default of payment of fine amount, he was sentenced, to, undergo simple imprisonment for one year.

2. The convict/accused/appellant herein, becomes aggrieved therefrom, hence, through, casting the extant appeal before this Court, has strived to beget reversal(s) of the afore made verdict, of, conviction, and, the afore consequent therewith order, of, sentence(s) hence imposed, upon him.

3. The genesis of the prosecution story, is, embodied in Ex.PW1/A, exhibit whereof, is, a complaint made by the father of the victim, to, the SHO Police Station concerned,

wherein, he makes penally inculpable scribings against the accused, inasmuch, as, on 10.07.2017, after medical examination of the prosecutrix being made, by a private practitioner, his becoming intimated, vis-a-vis, the minor prosecutrix rather developing pregnancy. The afore intimation, was made, to the author of Ex.PW1/A, by the, mother of the prosecutrix. Thereafter, upon, the minor prosecutrix being queried by her mother, one Bhuvneshwari, the former revealed, vis-a-vis, since November, 2016, the accused subjecting her to repeated forcible sexual intercourses, and, also his intimidating her, against hers disclosing, the, afore incident to anybody. On anvil of the afore complaint, an FIR came to be recorded, by, the SHO Police Station, Jhakri, FIR whereof is embodied, in, Ex.PW18/A. During the course of investigations into the allegations, occurring, in the afore alluded FIR, the prosecutrix made a statement under Section 164, of, the Cr.P.C., before the learned Addl. Chief Judicial Magistrate, (i) and, therein she makes echoings carrying corroborations, vis-a-vis, the disclosure(s), as, made in Ex.PW1/A. Furthermore, during the course of investigations, the Investigating Officer concerned, through, memo borne in Ex.PW14/B, hence, collected blood samples of the accused, on FTA card, and, through memo, borne in Ex.PW15/C, he collected blood samples, on FTA card, of, the minor prosecutrix, and, also through memo borne in Mark-A, he collected the blood samples, on FTA card, of, the minor baby, of, the minor prosecutrix. The afore collected blood samples, on FTA cards, respectively of the accused, the minor prosecutrix, and, of the minor baby, were all sent, for their inter se comparison, to, the FSL concerned. The FSL concerned, after making the apposite inter se profiling(s), of, the afore collected blood samples, on FTA cards, of, each of the afore, made a pronouncement, as become(s) borne in Ex.PY, vis-a-vis, each carrying inter se compatibility.

4. Though, the afore best scientific evidence existing on record, unflinchingly proves the charge against, the, accused, (i) nonetheless, the learned counsel appearing, for the appellant, strives to make an argument(s), that, the sexual intercourses, which occurred inter se the accused, and, the prosecutrix, rather being consensual. However, to succeed in his endeavour, he has to ensure, the ripping(s) apart, of the efficacy, of, all the effects, of, the reflections, as, become borne in Ex.PW3/B, reflections whereof, are personificatory qua the prosecutrix, being a minor, at the relevant time, whereupons, she became completely defacilitated, to, mete any valid apposite consent, to, the accused.

5. The afore birth certificate, borne in Ex.PW3/B, is, issued by the Secretary, Gram Panchayat concerned, and, therefrom, it, obviously, emanates, from, a valid source, and, also when it is issued, during the course of his discharging, his public duties, (I) thereupon, the mandate of Section 35 of the Indian Evidence Act, becomes attracted thereon, (ii) and, when mandate thereof(s) hence impute a rebuttable presumption, of, truth to the all acts, and,

functions performed by a public servant, during the course, of, discharge of his public duties, as, is, the one appertaining, to, the incorporation, of, the date(s) of birth(s), (iii) thereupon, the, reflections, qua the date, of, birth, of, the prosecutrix hence occurring, Ex.PW3/B, rather enjoy, a, statutory rebuttable presumption of truth. However, a reading, of, the cross-examination of PW-3, unveils qua it not containing any suggestion(s), wherefrom, any conclusion, can be drawn, vis-a-vis, Ex.PW3/B becoming falsely recorded or it being not recorded, at the instance of the father of the minor prosecutrix, nor any evidence exists on record, in display(s), hence, personificatory, of, falsity of authorship of Ex.PW3/B. The, effects, of, omission(s) of the afore suggestions, being purveyed to PW-3, and, also when Ex.PW3/B, emanates from a valid source, is qua, (iv) thereupon, the afore rebuttable presumption of truth enjoyed by Ex.PW3/B, upon, evidently remaining un-benumbed, and, un-dislodged, through, adduction, of, cogent evidence, rather acquires an aura, of, conclusive probative sanctity.

6. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence, on record, in a wholesome and harmonious manner, and, the analysis thereof, by the learned trial Court, hence does not suffer, from, any perversity or absurdity of mis-appreciation, and, non-appreciation, of evidence, on record.

7. Consequently, there is no merit, in, the extant appeal, and, it is dismissed accordingly. The impugned judgment is maintained, and, affirmed. All pending applications also stand disposed of. The records be sent down forthwith.

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

CWPOA No.6 of 2019

Reserved on : 08.10.2020
Decided on : 02.11.2020

Shri Kamal Kumar Bhardwaj and others ....Petitioners.

Versus

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

For the petitioners: Mr. Rajiv Rai, Advocate.

For the respondents: Mr. Sanjeev Kumar Motta, Advocate, for respondent No.1.
Mr. Sumesh Raj, Mr. Dinesh Thakur and

Mr. Sanjeev Sood, Additional Advocates General, with Ms. Divya Sood, Deputy Advocate General, for respondents No.2 and 3-State.

Mr. C.S. Thakur, Advocate, for respondents No.4 and 5.

Mr. Dilip Sharma, Senior Advocate, with Mr. Manish Sharma, Advocate, for respondents No.6 to 10.

CWPOA No.7 of 2019

Reserved on : 13.10.2020
Decided on : 02.11.2020

Tipendra Kumari ....Petitioner.

Versus

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

For the petitioner: Ms. Sunita Sharma, Senior Advocate, with Mr. Dhananjay Sharma, Advocate.

For the respondents: Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General, for respondents No.1 and 3.
Mr. Sanjeev Kumar Motta, Advocate, for respondent No.2.

Mr. Dilip Sharma, Senior Advocate, with Mr. Manish Sharma, Advocate, for respondents No.4 and 6.

Mr. Rajiv Rai, Advocate, for respondent No.5.

CWPOA No.19 of 2019

Reserved on : 08.10.2020
Decided on : 02.11.2020

Sudha Batta ....Petitioner.

Versus

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

CWPOA No.6 of 2019 alongwith
CWPOA Nos.7 of 2019 & 19 of 2019
CWPOA No.19 of 2019
Decided on : 02.11.2020

Constitution of India:- Article 226 – 3 writ petitions disposed of- Petitioners applied for the post of Food Safety Officers and their application were rejected on the ground of non-possessing the required degree- Order challenged on the ground of arbitrariness – It was held that word degree used in Recruitment and Promotion Rules means only a 'Bachelors Degree- None of the petitioners possess a 'Bachelors Degree in the subjects mentioned- All the petitions dismissed.

For the petitioner: Mr. Lalit Kumar Sehgal, Advocate.

For the respondents: Mr. Sanjeev Kumar Motta, Advocate, for respondent No.1.

Mr. Sumesh Raj, Mr. Dinesh Thakur and
Mr. Sanjeev Sood, Additional Advocates General, with Ms. Divya Sood, Deputy Advocate General, for respondent No.2-State.

Mr. C.S. Thakur, Advocate, for respondents No.3 and 4.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

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

2. Arguments were heard in CWPOA Nos.6 of 2019 and 19 of 2019, on 8th October, 2020, on which date, judgment was reserved in these petitions. CWPOA No.7 of 2019, was tagged alongwith CWPOA Nos.6 of 2019 and 19 of 2019. However, on the request of learned Senior Counsel for the petitioner, further hearing in this petition was deferred for 13.10.2020 and for this limited purpose, this petition was delinked from CWPOA Nos.6 of 2019 and 19 of 2019, to enable the learned Senior Counsel appearing for the petitioner in the said petition to make her submissions in addition to the submissions already made by the learned counsel for the petitioners in the connected petitions and accordingly, on 13.10.2020, arguments were heard in CWPOA No.7 of 2019 and judgment was reserved.

3. Vide advertisement No.34-1/2018 (appended with CWPOA No.6 of 2019, as Annexure A/3), the Himachal Pradesh Staff Selection Commission, Hamirpur, H.P., invited applications, inter alia, for the post of Food Safety Officers. The post Code was '657' and as per advertisement, in all, applications were invited for 19 posts which were to be filled up on contract basis in the pay scale of Rs.5910-20200+3000 GP. The minimum essential qualification prescribed for the post in issue, in terms of Recruitment and Promotion Rules, was as under:-

657 Food Safety Officer	i) ii) iii)	A Degree in Food Technology or Dairy Technology or Biotechnology or Oil Technology or Agricultural Science or Veterinary Sciences or Bio-Chemistry or Microbiology or Master's Degrees in Chemistry or Degree in Medicine from recognized University; or Any other equivalent/recognized qualification notified by the Central Government; and Has successfully completed training as specified by the Food Authority in a recognized institute or institution approved for the purpose. Provided that no person who has any financial interest in the manufacture, import or sale of any article of food shall be appointed to be a Food Safety Officer under this rule.

4. The petitioners are candidates whose candidatures have been rejected on the ground that they do not possess Bachelor's Degree in Food Technology or Dairy Technology or Biotechnology or Oil Technology or Agricultural Science or Veterinary Sciences or Bio-Chemistry or Microbiology.

5. The grievance of the petitioners is that rejection of their candidatures on the ground that they do not possess a Bachelor's Degree in the subjects enumerated hereinabove, is arbitrary and thus, not sustainable in the eyes of law, as they were eligible for being appointed as Food Safety Officers in terms of essential qualifications mentioned in the advertisement as well as the Recruitment and Promotion Rules.

6. According to the petitioners, they possessed Master's Degree in either of the specialties, which stood mentioned in the column of minimum qualifications as per Recruitment and Promotion Rules, against post Code No.657, therefore, the rejection of their candidatures is bad in law, because when the advertisement did specifically mention that it was a Bachelor's Degree in the trades which was required, then the word "Degree" has to be interpreted mentioning both "Bachelor's Degree" as well as "Master's Degree". This is the only controversy involved in these petitions.

7. Thus, the moot issue which this Court has to decide is as to whether the word "Degree" used in the column of minimum educational qualifications as per Recruitment and Promotion Rules against post Code No.657 means "Bachelor's Degree" only or will it include both "Bachelor's Degree" as well as "Master's Degree" also.

8. Before proceeding further, at this stage, it is clarified that none of the petitioners is having a Bachelor's Degree in Food Technology or Dairy Technology or

Biotechnology or Oil Technology or Agricultural Science or Veterinary Sciences or Bio-Chemistry or Microbiology.

9. There are on record Food Safety and Standards Rules, 2011, which stand published in the Extraordinary Gazette of India, vide Notification dated 5th May, 2011, in exercise of powers conferred under Section 91 of the Food Safety and Standards Act, 2006, as well as other Sections of the Act. Chapter-2 of these Rules deals with Enforcement Structure and Procedures. Clause 2.1.3 of the said Chapter deals with Food Safety Officers and in terms of this Rule, Food Safety Officer shall be a whole time officer and shall on the date on which he is so appointed possesses qualifications which stand mentioned therein, which read as under:-

"(i) a Degree in Food Technology or Dairy Technology or Biotechnology or Oil Technology or Agricultural Science or Veterinary Sciences or Bio-Chemistry or Microbiology or Master's Degree in Chemistry or degree in medicine from a recognized University, or

(ii) any other equivalent/ recognized qualification notified by the Central Government, and

(iii) has successfully completed training as specified by the Food Authority in a recognized institute or Institution approved for the purpose."

10. There is also on record appended with CWPOA No.6 of 2019, as Annexure A-10 by the petitioners a clarification issued by the Assistant Director, Food Safety and Standards Authority of India, dated 18th May, 2019, which appears to be given on a request of one of the petitioners regarding educational qualification for the post of Food Safety Officers and this clarification reads as under:-

"Subject: Clarification regarding educational qualification for the post of Food Safety Officer.

Sir,

This is with reference to your application dated 16.05.2019 on the subject noted above.

2. In this regard, it is informed that Section 22(3) of UGC Act, 1956 defines the term "degree" which was awarded with previous approval of Central Government and notified by UGC and classified into three types viz. "Bachelor's Degree, "Master's Degree" and "Doctorate Degree" unless the type of degree is specified in the recruitment Regulations, the "degree", may refer to any of the types mentioned above."

11. There are also on record Recruitment and Promotion Rules for the post of Food Safety Officers in the Department of Health Safety and Regulation Himachal Pradesh, a copy of which, both in vernacular and English is appended with the reply of respondents No.6 to 8 to the petition, i.e., CWPOA No.6 of 2019. These Rules have been framed by the Governor of Himachal Pradesh in exercise of powers conferred by proviso to Article 309 of the Constitution of India and they have been notified, vide Notification published in Official Gazette of the

Government of Himachal Pradesh dated 6th December, 2017. Clause-7 of these Rules deals with minimum educational and other qualifications required for direct recruit(s) and the same reads as under:-

> *7. "Minimum Educational and Other qualifications required for direct recruit(s).___*
> *(a) ESSENTIAL QUALIFICATIONS:- (i) A degree in Food Technology or Dairy Technology or Biotechnology or Oil Technology or Agricultural Science or Veterinary Sciences or Bio-Chemistry or Microbiology or Master's Degrees in Chemistry or Degree in Medicine from recognized University; or*
> *(ii) Any other equivalent/recognized qualification notified by the Central Government; and*
> *(iii) Has successfully completed training as specified by the Food Authority in a recognized institute or institution approved for the purpose;*
> *Provided that no person who has any financial interest in the manufacture, import or sales of any article of food shall be appointed to be a Food Safety Officer under this rule.*
> *(b) Desirable Qualification(s):-Knowledge of customs, manners and dialects of Himachal Pradesh & suitability for appointment in the peculiar conditions prevailing in the Pradesh."*

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

13. A perusal of essential qualification prescribed in Rule-7 of the Recruitment and Promotion Rules read harmoniously with minimum educational qualifications prescribed in the advertisement in issue, as also Food Safety and Standards Rules, 2011, demonstrates that a candidate in order to be eligible to be appointed as Food Safety Officer must possess a "Degree" in Food Technology or Dairy Technology or Biotechnology or Oil Technology or Agricultural Science or Veterinary Sciences or Bio-Chemistry or Microbiology or **"Master's Degree" in Chemistry** and Degree in Medicine from recognized University. In the Rules notified by the Central Government as well as in the Recruitment and Promotion Rules framed by the Health Safety and Regulation Department, in the same sentence which pertains to essential qualification, two terms have been used, which are; (a) "Degree" when it comes to certain subjects/trades and "Master's Degree", when it pertains to some other subjects/trades. This means that both the framers of Statutory Rules, 2011, as well as Recruitment and Promotion Rules, were cautious of the fact that the word "Degree" used in the Recruitment and Promotion Rules and Statutory Rules connotes only a "Bachelor's Degree", because if that was not the intent of the word so used both in Statutory Rules or in the Recruitment and Promotion Rules, then when it came to the subject of Chemistry, there was no requirement or need of prefixing before it the word "Master's Degree". Therefore, in the considered view of this Court, the word

"Degree" used in the Recruitment and Promotion Rules or in the advertisement cannot be read, to mean both Master's Degree as well as Bachelor's Degree, as the intent of the employer is clear and unambiguous that as far as the subject of Chemistry is concerned, the candidate applying ought to possess a "Master's Degree", whereas for other subjects, a simple "Degree" which obviously means the "Bachelor's Degree", was the essential qualification.

14. It is reiterated that none of the petitioners possess a Bachelor's Degree in either of the subjects mentioned in the Recruitment and Promotion Rules. Incidentally, during the course of arguments, learned counsel for the petitioners were quite emphatic in their submissions that it was not as if the case of the petitioners was that when a Bachelor's Degree in the subject in which they possess a Master's Degree was the minimum qualification prescribed, then a Master's Degree in the same subject referred a candidate possessing such Degree eligible to be considered and appointed against the post in issue. Their clear and categorical argument was that the word "Degree" used in the advertisement as well as Recruitment and Promotion Rules has to be read inclusive of both "Bachelor's Degree" and "Master's Degree". However, as this Court is of the view that the word "Degree" used in the Recruitment and Promotion Rules, means only a "Bachelor's Degree", because the employer has categorically prefixed the word "Master's Degree" in the subject in which it wanted the candidate to possess a "Master's Degree", therefore, there is no merit in the contention of the petitioners nor is there any illegality in the act of the respondents of rejecting the candidatures of the petitioners for the posts in issue.

15. Accordingly, in view of the observations made hereinabove, all these petitions are dismissed, so also pending miscellaneous applications, if any. All interim orders are vacated.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN. JUDGE AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, JUDGE

1. **CWP No. 1515 of 2019**

Parkash Chand ...Petitioner.

Versus

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

2. **CWP No.4502 of 2020**

Dharam Singh ..Petitioner

Versus

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

3.**CWPOA No. 6741 of 2020**

Parkash Chand ...Petitioner

Versus

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

CWP No. 1515 of 2019 a/w CWP No. 4502 of 2020
and CWPOA No. 6741 of 2020
Reserved on: 04.11.2020
Decided on: 12. 11.2020.

Constitution of India:-Article 226 – Petitioner Parkash Chand was not considered for promotion to the post of Forest Guard – Petitioner Dharm Singh requested for direction to declare the result of written test and to make appointment of Forest Guard- It is held that petitioner Parkash Chand is simply matriculate and has not acquired 10+2 qualification within 3 years – Held not entitled to be considered for promotion to the post of Forest Guard – Petition of Parkash Chand was dismissed-Petition of Dharam Singh is allowed with direction to the respondents to declare the result.

Cases referred:

P.U. Joshi and others vs. Accountant General, Ahmadabad and others (2003) 2 SCC 632);
Official Liquidator vs. Dayanand and others (2008) 10 SCC 1);
Chandigarh Administration through the Director Public Instructions (Colleges) Chandigarh vs. Usha Kheterpal Wale and others (2011) 9 SCC 645);
State of Gujarat and others vs. Arvindkumar T. Tiwari and another (2012) 9 SCC 545);

For the Petitioner(s) : Ms. Archana Dutt, Advocate, for the petitioner(s) in CWP No. 1515 of 2019 & CWPOA No. 6741 of 2020.

For the Respondents: Mr. Kul Bhushan Khajuria, Advocate, for the petitioner in CWP No. 4502 of 2020.

Mr. Ashok Sharma, Advocate General, with Mr. Vinod Thakur, Mr. Shiv Pal Manhans, Addl. A.Gs., Mr. Bhupinder Thakur, Ms. Seema Sharma and Mr. Yudhvir Thakur, Dy. A.Gs.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, J.

Aggrieved by non-consideration of the candidature for the post of Forest Guard under 10% quota kept for Class-IV employees as per the Recruitment and Promotion Rules notified vide notification dated 20.09.2014, the petitioner Parkash Chand preferred Original Application No. 1756 of 2019(now registered as CWPOA No. 6741 of 2020) before the erstwhile

H.P. State Administrative Tribunal (for short 'Tribunal'), for the grant of following substantive reliefs:

> *i) That the respondents may kindly be directed to promote the applicant to the post of Forest Guard.*
> *ii) That the respondents may kindly be directed to grant promotion as Forest Guard from the date his junior Sh.Dinesh Kumar is promoted as Forest Guard with all consequential benefits.*
> *Iii) That the respondents may kindly be directed to grant seniority to the applicant from the date applicant is granted work charge status."*

2. However, since no interim relief was granted by the Tribunal, the petitioner Parkash Chand approached this Court by filing fresh petition being CWP No. 1515 of 2019 wherein he then claimed the following reliefs:

> *i) That the respondents may kindly be directed to promote the petitioner to the post of Forest Guard.*
> *ii) That the respondents may kindly be directed to grant promotion to the petitioner as Forest Guard from the date his junior Sh.Dinesh Kumar is promoted as Forest Guard with all consequential benefits.*
> *Iii) That the respondents may kindly be directed to grant seniority to the petitioner from the date the petitioner has been granted work charge status."*

3. This Court vide order dated 11.07.2019 passed interim orders in favour of the petitioner by directing the respondents to consider his case also in the DPC provided he falls within the zone of consideration.

4. Since the results of the selection were not being declared, the petitioner in the third petition Dharam Singh then filed petition being CWP No. 4502 of 2020 for the grant of following substantive reliefs:

> *I) That in view of the facts and circumstances mentioned hereinabove in this writ petition, the writ petition may kindly be allowed and the respondent No.3 may kindly be directed to declare the result of written test which were held on 12.7.2019 for the post of Forest Guard amongst the Class-IV under 10% quota.*
>
> *ii) That the respondent department further may kindly be directed to make the appointment of Forest Guard on the basis of the written test against 05 notified posts."*

5. From the aforesaid narration of facts, it would be noticed that insofar as the petition filed by Dharam Singh case is concerned, the same is not directly dependent upon the outcome of the two cases filed by the petitioner Parkash Chand because in any event the results have to be declared.

6. Now, adverting to the claims of petitioner Parkash Chand, it would be noticed that he was engaged as Forest Worker on daily wage basis in Forest Department w.e.f. January, 1990 and thereafter his services were regularised as Chowkidar w.e.f. 15.05.2003.

7. In the Recruitment and Promotion Rules, 2003, Rules 10 and 11 provide 90% by way of direct recruitment and 10% by way of promotion amongst the Class-IV employees of Forest Department, who were matriculate with five years services. It is apt to reproduce Rules 10 and 11 which read as under:

"10. Method of recruitment whether by direct recruitment or by promotion, deputation, transfer and the percentage of posts to be filled in by various methods.	i) 90% by direct recruitment ii) 10% by promotion.
11. In case the recruitment by promotion, deputation, transfer, grade from which promotion/ deputation/transfer is to be made.	By promotion from amongst Class-IV employees of Forest Department who are Matriculate with five years or Middle pass with ten years regular service or regular combined with continuous adhoc service in the grade respectively. Provided that the promotion shall be made on the basis of limited competitive test.

8. It is not in dispute that these Rules were thereafter amended in the year 2014 vide notification dated 20.9.2014 and now the eligibility for the post of Forest Guard in terms of Rules 10 and 11 of the Recruitment and Promotion Rules, is as under:

"10. Method(s) of recruitment whether by direct recruitment or by promotion, deputation, secondment, transfer and the percentage of post(s) to be filled in by various methods.	i) 90% by direct recruitment on a regular basis or by recruitment on contract basis, as the case may be. ii) 10% by promotion on the basis of Limited Competitive Test.
11. In case of recruitment by promotion, deputation, transfer, grade from which promotion/deputation/ transfer is to be made.	By promotion from amongst Class-IV officials i.e. Resin Watcher, Timber Watcher, Depot Watcher, Malies, Sweepers, Peons, Chowkidars, Dak Runners and Forest Workers possessing the recognized 'Matric/10+2 or its equivalent qualification' with 05 (five) years regular service or regular combined with continuous adhoc

	service, if any, in the grade. Provided that a Class-IV official possessing 'Matric' qualification shall have to acquire the recognized qualification of 10+2 within a period of 03 (three) years. If the candidate fails to acquire the 10+2 qualification by 31.12.2017, then he/she shall be reverted to the parent Class-IV post. Provided that the above proviso shall not render such Class-IV officials having qualification of Matric or its equivalent, ineligible for promotion to the post of Forest Guard against 10% quota, who were in the cadre of Class-IV after attaining the age of 50 years.

9. The grievance of the petitioner Parkash Chand is that he has illegally not been considered for promotion to the post of Forest Guard only because he is matriculate, whereas, as per the Rules, he can acquire the qualification within three years and moreover, the respondents cannot deny the petitioner's promotion on the basis of amended Rules.

10. This petitioner further claimed that he was fully eligible for promotion in the year 2012 when there was no amendment in the Recruitment and Promotion Rules and only matriculates were eligible for promotion. Now, therefore the impugned action of the respondents ignoring the candidature of the petitioner is wrong and illegal and the petitioner deserves to be promoted as Forest Guard, as he is senior to one Dinesh Kumar.

11. We have heard learned counsel for the parties and have gone through the material available on records.

12. At the outset, it needs to be observed that in **P.U. Joshi and others** vs. **Accountant General, Ahmadabad and others (2003) 2 SCC 632),** the Hon'ble Supreme Court held as under:

> *"10……Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of policy is within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the statutory tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State.*

Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/substraction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time,as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing the existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service."

13. In **Official Liquidator** vs. **Dayanand and others (2008) 10 SCC 1),** the Hon'ble Supreme Court held as under:

"59. The creation and abolition of posts, formation and structuring/restricting of cadres, prescribing the source and mode of recruitment and qualifications and criteria of selection, etc. are matters which fall within the exclusive domain of the employer. Although the decision of the employer to create or abolish posts or cadres or to prescribe the source or mode of recruitment and laying down the qualification, etc. is not immune from judicial review, the Court will always be extremely cautious and circumspect in tinkering with the exercise of discretion by the employer. The Court cannot sit in appeal over the judgment of the employer and ordain that a particular post or number of posts be created or filled by a particular mode of recruitment. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provisions or is patently arbitrary or vitiated by malafides."

14. In **Chandigarh Administration through the Director Public Instructions (Colleges) Chandigarh** vs. **Usha Kheterpal Wale and others (2011) 9 SCC 645)**, the Hon'ble Supreme Court held as under:

"22. *It is now well settled that it is for the rule-making authority or the appointing authority to prescribe the mode of selection and minimum qualification for any recruitment. The courts and tribunals can neither prescribe the qualifications nor entrench upon the power of the authority concerned so long as the qualifications prescribed by the employer is reasonably relevant and has a rational nexus with the functions and duties attached to the post and are not violative of any provision of the Constitution, statute and rules. (See J. Ranga Swamy v. Govt. of A.P. and P.U. Joshi v. Accountant General). In the absence of any rules, under Article 309 or statute, the appellant had the power to appoint under its general power of*

administration and prescribe such eligibility criteria as it is considered to be necessary and reasonable. Therefore, it cannot be said that the prescription of Phd is unreasonable."

15. In **State of Gujarat and others** vs. **Arvindkumar T. Tiwari and another (2012) 9 SCC 545**), the Hon'ble Supreme Court held as under:

"10. The appointing authority is competent to fix a higher score for selection, than the one required to be attained for mere eligibility, but by way of its natural corollary, it cannot be taken to mean that eligibility/norms fixed by the statute or rules can be relaxed for this purpose to the extent that, the same may be lower than the ones fixed by the statute. In a particular case, where it is so required, relaxation of even educational qualification(s) may be permissible, provided that the rules empower the authority to relax such eligibility in general, or with regard to an individual case or class of cases of undue hardship. However, the said power should be exercised for justifiable reasons and it must not be exercised arbitrarily, only to favour an individual. The power to relax the recruitment rules or any other rule made by the State Government/Authority is conferred upon the Government/Authority to meet any emergent situation where injustice might have been caused or, is likely to be caused to any person or class of persons or, where the working of the said rules might have become impossible. (Vide: State of Haryana v. Subhash Chandra Marwaha, J.C. Yadav v. State of Haryana, and Ashok Kumar Uppal v. State of J & K.)

11. The courts and tribunal do not have the power to issue direction to make appointment by way of granting relaxation of eligibility or in contravention thereof. In State of M.P. & Anr. v. Dharam Bir, this Court while dealing with a similar issue rejected the plea of humanitarian grounds and held as under: (SCC p. 175, para 31)

> *"31..... The courts as also the tribunal have no power to override the mandatory provisions of the Rules on sympathetic consideration that a person, though not possessing the essential educational qualifications, should be allowed to continue on the post merely on the basis of his experience. Such an order would amount to altering or amending the statutory provisions made by the Government under Article 309 of the Constitution."*

12. Fixing eligibility for a particular post or even for admission to a course falls within the exclusive domain of the legislature/executive and cannot be the subject matter of judicial review, unless found to be arbitrary, unreasonable or has been fixed without keeping in mind the nature of service, for which appointments are to be made, or has no rational nexus with the object(s) sought to be achieved by the statute. Such eligibility can be changed even for the purpose of

promotion,unilaterally and the person seeking such promotion cannot raise the grievance that he should be governed only by the rules existing, when he joined service. In the matter of appointments, the authority concerned has unfettered powers so far as the procedural aspects are concerned, but it must meet the requirement of eligibility etc. The court should therefore, refrain from interfering, unless the appointments so made, or the rejection of a candidature is found to have been done at the cost of 'fair play', 'good conscious' and 'equity'. (Vide: State of J & K v. Shiv Ram Sharma and Praveen Singh v. State of Punjab.)

14. A person who does not possess the requisite qualification cannot even apply for recruitment for the reason that his appointment would be contrary to the statutory rules is, and would therefore, be void in law. Lacking eligibility for the post cannot be cured at any stage and appointing such a person would amount to serious illegibility and not mere irregularity. Such a person cannot approach the court for any relief for the reason that he does not have a right which can be enforced through court. (See: Prit Singh v. S.K. Mangal and Pramod Kumar v. U.P. Secondary Education Services Commission.)"

16. Adverting to the facts, it would be noticed that it is Rule of 2014 that governs the field with respect to the promotion to be made under 10% quota by way of promotion from Class-IV employees to the post of Forest Guard in the Forest Department.

17. Amended Rules 10 & 11 of the Recruitment and Promotion Rules, provide 90% by direct recruitment and 10% by promotion on the basis of limited competitive test amongst Class-IV officials i.e. Resin Watcher, Timber Watcher, Depot Watcher, Malies, Sweepers, Peons, Chowkidars, Dak Runners and Forest Workers possessing the recognized Matric/10+2 or its equivalent qualification with 05 (five) years regular service or regular combined with continuous adhoc service, if any, in the grade.

18. It is the case of petitioner Parkash Chand himself that he is simply matriculate and has not acquired 10+2 qualification within three years or upto the cut off date i.e. 31.12.2017 and is therefore not entitled to be considered much less promoted to the post of Forest Guard.

19. In view of the aforesaid discussions and for the reasons stated hereinabove, we find no merit in the petitions filed by the petitioner Parkash Chand being CWP No. 1515 of 2019 and CWPOA No. 6741 of 2020 and the same are dismissed.

20. Now that the petition filed filed by the petitioner Dharam Singh, being CWP No. 4502 of 2020, there is no legal impediment in declaring the result. Accordingly, the petition filed

by petitioner Dharam Singh, being CWP No. 4205 of 2020, is ordered to be allowed and the respondents are directed to declare the result of the petitioner.

21. Since the result of petitioner Dharam Singh has not been declared for no fault on his part, therefore, the petitioner shall be entitled for all benefits except monetary benefits from the date of declaration of the results of similarly situated persons.

22. The petitions stand disposed of in the aforesaid terms, so also the pending application(s), if any.

BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA. JUDGE

National Insurance Company Ltd. ..Appellant

Versus

Banta Singh and others .....Respondents

FAO(MVA) No. 205 of 2019
Decided on: November 10 2020

Motor Vehicle Accident Tribunal:- Motor Vehicles Act – Sections 173 & 166- Deceased was doing ITI in Motor Mechanic, his income was assessed at Rs. 6000/- p.m. The claims tribunals awarded Rs. 10,06,000/- compensation award was challenged – Held, that deceased was not in regular employment, only 40% addition on account of future prospects was allowed instead of 50%- Award modified accordingly.

Cases referred:
National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680;
Magma General Insurance Co. Ltd. v. Nanu Ram and Ors., Civil Appeal No. 9581 of 2018 decided on 18.9.2018;
Ranjana Prakash and others vs. Divisional Manager and another (2011) 14 SCC 639;

For the appellant : Mr. Bhupender Pathania, Advocate.

For the respondents : Mr. Neel Kamal Sharma, Advocate, for respondents Nos.1 to 4.
Ms. Sheetal Vyas, Advocate, for respondent No.5.
Mr. Amit K. Vaid, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant appeal filed under S.173 of the Motor Vehicles Act, lays challenge to Award dated 1.6.2017 passed by learned Motor Accident Claims Tribunal, Una, District Una ,Himachal Pradesh in MACP No. 100 of 2015, whereby learned Tribunal below, while allowing

claim petition having been filed by respondents Nos. 1 to 4/claimants (hereinafter, 'claimants') under S.166 of the Motor Vehicles Act (hereinafter, 'Act'), directed the appellant-Insurance Company to pay compensation to the tune of Rs.10,06,000/- alongwith interest at the rate of 9% per annum, from the date of filing of the petition till realisation, to claimants Nos. 3 and 4.

2. Precisely, the facts of the case as emerge from the record are that a petition under S.166 of the Act came to be instituted at the behest of the claimants before learned Tribunal below, claiming compensation to the tune of Rs.30.00 Lakh on account of death of Amandeep i.e. son of claimants Nos. 2 and 3. It is averred in the petition that on 15.6.2015, a private bus bearing registration No. HP-72-8969 being driven by respondent No.5, met with an accident, as a result of which, deceased Amandeep died on the spot, whereas, other passengers suffered serious multiple injuries. At the time of accident, deceased was doing ITI in Motor Mechanic, from Industrial Training Institute, Una. Claimants claimed that the deceased was an intelligent young student and besides pursuing his studies/course, was also doing agriculture and household work. As per claimants, deceased used to provide financial assistance of more than Rs.10,000/- per month to his family. Claimants claimed that the deceased was the only young male member to look after his family as such, they are entitled to compensation on account of mental shock, agony and loss of love and affection.

3. Respondents Nos. 5 and 6, by way of joint reply, though admitted the factum with regard to accident, but denied that the vehicle in question was being driven in a rash and negligent manner by respondent No. 5.

4. Appellant-Insurance Company, while contesting the petition on the ground that the driver was not holding a valid and effective driving licence to drive the vehicle in question, contended that the vehicle was being plied in infraction of terms of the insurance policy and as such, it is not liable to indemnify the insured.

5. On the basis of pleadings adduced on record, learned Tribunal below framed following issues:

"1. Whether the deceased Amandeep died on 15.06.2015 due to the rash and negligent driving of the bus bearing registration No. HP-72-8969 by respondent No. 1, as alleged? OPP

2. If issue No.1 is proved in affirmative, whether the petitioners are entitled to compensation, if so, to what amount and from whom? OPP.

3. Whether the petition is not maintainable? OPR

4. Whether the respondent No.1 was not having valid and effective driving licence at the time of accident in question, if so, its effect? OPR-3.

5. Whether the vehicle in question was being driven in violation of the terms and conditions of the insurance policy and provisions of M.. Act, if so, its effect? OPR3.

6. Relief."

6. Subsequently, vide Award dated 1.6.2017, learned Tribunal below allowed the claim petition, thereby holding claimants Nos. 3 and 4 entitled to compensation to the tune of Rs.10,06,000/- with interest at the rate of 9% per annum from the date of filing of the petition till realisation. In the aforesaid background, appellant-Insurance Company has approached this Court in the instant proceedings, praying therein to set aside the impugned award being on higher side/excessive.

7. Having heard learned counsel for the parties and perused the material available on record, this Court finds that primarily Award has been impugned by appellant-Insurance Company on the following grounds, viz., assessment of income of deceased, grant of 50% increase on account of future prospects, higher amount under the head of funeral charges and compensation of Rs.1.00 Lakh each granted under the head of loss of love and affection and loss of expectation of life.

8. Mr. Bhupender Pathania, Learned Counsel appearing for the appellant-Insurance Company vehemently argued that since it stands duly established on record that at the time of alleged accident, deceased was pursuing his studies and no specific proof of income of the deceased from agricultural pursuits, if any, ever came to be led on record, learned Tribunal below wrongly took the income of the deceased as Rs.6,000/- per month. He further contended that in such like situation, learned Tribunal below ought to have taken into consideration minimum wages prevalent in the State at the time of accident. While placing reliance upon law laid down in **National Insurance Co. Ltd.** v. **Pranay Sethi**, (2017) 16 SCC 680, Learned Counsel appearing for the appellant contends that since deceased was not engaged in regular employment, 50% increase on account of loss of future prospects could not have been granted and same ought to have been 40%. Besides this, Learned Counsel appearing for the appellant argued that in view of law laid down in Pranay Sethi (supra) no amount could have been granted under the head of loss of love and affection and loss of expectation of life. He argued tht under the head of funeral expenses, maximum amount that could be granted is Rs.15,000/- , as such, Award deserves reduction on the aforesaid grounds.

9. Per contra, Mr. Neel Kamal Sharma, learned counsel for the claimants contended that since it stands duly proved on record that at the time of accident deceased was pursuing diploma in motor mechanic from Industrial Training Institute, Una, learned Tribunal below rightly assessed his monthly income at Rs.6,000/- per month. Mr. Sharma, fairly conceded that in terms of Pranay Sethi (supra) only 40% addition on account of loss of future prospects and only Rs.15,000/- on account of funeral expenses, could have been awarded but there is no illegality in the Award inasmuch award of sum of Rs.1.00 Lakh on account of loss of expectation

of life is concerned. He also contended that learned Tribunal below has not awarded any amount on account of filial consortium to claimants Nos. 2 and 3 being father and mother, as has been held by Hon'ble Apex Court in **Magma General Insurance Co. Ltd.** v. **Nanu Ram and Ors.**, Civil Appeal No. 9581 of 2018 decided on 18.9.2018. Mr. Sharma further contended that no amount has been awarded on account of loss of estate, as such, Award deserves to be enhanced on these two counts.

10. True it is that as per record available, claimants were not able to prove that at the time of alleged accident, deceased was earning Rs.6,000/- per month on account of agricultural pursuits but since it stands duly proved on record that at the time of alleged accident, deceased was pursuing ITI diploma learned Tribunal below has rightly considered his income as Rs.6,000/- per month.

11. Though it is settled law that in case where specific evidence is not available with respect to income, courts are required to refer to formula of minimum wages but, in the case at hand, record reveals that learned Tribunal below has assessed the income of the deceased on the basis of wages payable under MGNREGA, prevalent at the time of accident, which otherwise conform to the Minimum Wages Act.

12. So far addition of 50% on account of loss of future prospects and grant of amount under the head of loss of estate is concerned, reference may be made to **Pranay Sethi** (supra), wherein Hon'ble Apex Court has held as under:

> "59. In view of the aforesaid analysis, we proceed to record our conclusions:-
>
> (i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.
>
> (ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.
>
> (iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.
>
> (iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the

deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

13. It is an admitted fact that the deceased was not in a regular employment, as such, only 40% addition on account of future prospects can be allowed. Besides this, only a sum of Rs.15,000/- could have been awarded for funeral expenses as such, award deserves to be modified on these counts. Also, no amount under the head loss of love and affection and loss of expectation of life could have been awarded by learned Tribunal below, as such, award deserves reduction on this ground also.

14. At this stage, Learned Counsel appearing for the claimants, while inviting attention to judgment rendered by Hon'ble Apex Court in **Magma General Insurance Co. Ltd.** v. **Nanu Ram and Ors.**, Civil Appeal No. 9581 of 2018 decided on 18.9.2018, argued that claimants No.2 and 3 being parents of deceased are also entitled to amounts on account of filial consortia, which as per aforesaid judgment ought to have been Rs.40,000/- each. Hon'ble Apex Court in **Magma General Insurance Co. Ltd.** (supra) has held as under:

> "8.7 A Constitution Bench of this Court in Pranay Sethi (supra) dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is Loss of Consortium.
>
> In legal parlance, "consortium" is a compendious term which encompasses 'spousal consortium', 'parental consortium', and 'filial consortium'.
>
> The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse.
>
> Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, co-operation, affection, and aid of the other in every conjugal relation."

> 4 Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training." Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and 3 Rajesh and Ors. vs. Rajbir Singh and Ors. (2013) 9 SCC 54 4 BLACK'S LAW DICTIONARY (5th ed. 1979) family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.
>
> Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world-over have recognized that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.
>
> The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of Filial Consortium.
>
> Parental Consortium is awarded to children who lose their parents in motor vehicle accidents under the Act.
>
> A few High Courts have awarded compensation on this count5. However, there was no clarity with 5 Rajasthan High Court in Jagmala Ram @ Jagmal Singh & Ors. v. Sohi Ram & Ors 2017 (4) RLW 3368 (Raj); Uttarakhand High Court in Smt. Rita Rana & Anr. v. Pradeep Kumar & 6 Ors. respect to the principles on which compensation could be awarded on loss of Filial Consortium.
>
> The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under 'Loss of Consortium' as laid down in Pranay Sethi (supra).
>
> In the present case, we deem it appropriate to award the father and the sister of the deceased, an amount of Rs. 40,000 each for loss of Filial Consortium."

15. Learned counsel for the appellant-Insurance Company argued that this Court has no power to award any extra amount/enhance the amounts already awarded by learned Tribunal below, since no cross-objections/appeal has been filed by the claimants. On the issue of power of an appellate court to make additional award, reference may be made to a judgment rendered by Hon'ble Apex Court in **Ranjana Prakash and others** vs. **Divisional Manager and another** (2011) 14 SCC 639, whereby, it has been held that amount of compensation can be enhanced by an appellate court, while exercising powers under Order 41 Rule 33 CPC. It would be profitable to reproduce following para of the judgment herein:-

> "Order 41 Rule 33 CPC enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 CPC can be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seek compensation against the owner and the insurer of the vehicle and the tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, alongwith the owner, even though the claimants had not challenged the non-grant of relief against the insurer."

16. In view of the discussions made supra and the law laid down by Hon'ble Apex Court in the afore-cited judgments, while taking monthly income of the deceased as Rs.6,000/- per month, total loss of dependency qua claimants No.3 and 3 can be assessed thus:

	Amount (Rs.)
Established monthly income of deceased	**6000**
Income after deducting 50% towards self expenses	**3000**
Addition of 40% i.e. 3000x 40 /100	**1200**
Net monthly income	**4200**
Total loss of dependency = 4200x 12x14	**705600**

17. In view of aforesaid discussion, Award is modified in the following manner:

Head	**Amount (Rs.)**
Loss of dependency (to claimants Nos. 3 and only)	705600
Loss of estate (to claimants Nos. 3 and 4 only)	15000
Funeral charges (to claimants Nos. 3 and 4 only)	15000
Total	**735600**
Loss of consortium payable to claimants Nos. 2 and 3 @ Rs.40000 each	80000
Total compensation	**815600**

18. So far rate of interest on the aforesaid amount is concerned, same calls for no interference as such, same is upheld.

19. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is disposed of and impugned award passed by learned Tribunal below is modified to aforesaid extent only. The apportionment shall remain as determined by learned Tribunal below in the impugned award.

Pending applications, if any, are also disposed of. Interim directions, if any, are vacated.

BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA. JUDGE

Sanjay Kumar .....Petitioner

Versus

Shakti Singh ....Respondent

Civil Revision No. 243 of 2018
Reserved on: October 27, 2020
Decided on: November 9, 2020

Code of Civil Procedure - Order 26 rule 9 Code of Civil Procedure- Order 21 Rule 32 - Section 151 CPC- One civil suit for permanent prohibitory injunction decreed and attained finality – Application under order 26 Rule 9 was filed in execution petition which was allowed- Order challenged – It was held that order 26 Rule 9 CPC is applicable in execution proceedings but the appointment of local commission can only be made after affording an opportunity of leading evidence to the parties with respect to violation of injunction order /judgment saught to be executed – Petition allowed.

Cases referred:
Liaquat Ali vs. Amir Mohammad & ors., Latest HLJ 2016 (HP) 831;

For the Petitioner : Mr. Ajay Sharma, Senior Advocate with Ms. Aanandita Sharma, Advocate.

For the Respondent : Mr. Vinod Thakur, Advocate.

THROUGH VIDEO-CONFERENCING

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Being aggrieved and dissatisfied with the order dated 14.11.2018 passed by learned Senior Civil Judge, Hamirpur, Himachal Pradesh in CMA No Exe. No. 20 of 2015, whereby an application under Order 26 Rule 9 CPC, having been filed by the respondent-

DH came to be allowed, petitioner-JD, has approached this Court in the instant proceedings with a prayer to set-aside the aforesaid impugned order.

2. Precisely, the facts of the case as emerge from the record are that the DH filed a Civil suit bearing No.109 of 2010 for permanent prohibitory injunction in the Court of learned Civil Judge (Senior Division), Hamirpur, Himachal Pradesh, which came to be allowed vide judgment and decree dated 14.5.2012 (Annexure P-1). Vide aforesaid judgment and decree passed by learned court below, petitioner-JD came to be restrained from changing the nature of the suit land by raising construction, until the suit land is partitioned in the process of law by metes and bounds, but relief of mandatory injunction was declined.

3. It is not in dispute that aforesaid judgment and decree passed by learned Court below has attained finality because no appeal whatsoever came to be filed at the behest of the petitioner-JD. Since despite there being restraint order issued against the petitioner- JD, he attempted to change the nature of the suit land by raising construction, DH filed an application under Order XXI Rule 32 and Section 151 CPC for execution of injunction decree dated 14.5.2012 in the Court of learned Senior Civil Judge, Hamirpur, District Hamirpur, Himachal Pradesh. DH averred in the application that JD on 16.5.2015 started digging the suit land with the JCB and also stacked building material with a view to raise construction over the suit land.

4. JD in reply to the aforesaid application denied the factum with regard to construction, if any, on the suit land by him after passing of the judgment and decree, sought to be executed in the instant proceedings. JD claimed that the construction raised by him is not over the suit land, but the same is on Khasra No.274 and 272. J.D claimed that there is already one cowshed stands constructed over Abadi since the time of his ancestors and at present no construction is being raised by him over the suit land.

5. In the aforesaid proceedings, DH filed an application under Order 26 Rule 9 CPC for appointment of revenue expert to demarcate the suit land. DH averred in the application that the respondents were injuncted from changing the nature of the suit land comprised Khasra No.275, measuring 00-01-93 hectares, but they have constructed the building over the suit land forcibly. JD opposed the aforesaid prayer made on behalf of the DH, but learned court below allowed the application and appointed Sh. Ashok Kumar, Naib Tehsil (Retired) as Local Commissioner to demarcate the suit land. In the aforesaid background, JD has approached this Court in the instant proceedings.

6. I have heard learned counsel for the parties and perused the record. Precisely, the question which falls for consideration of this Court in the instant proceedings is "whether a local commissioner can be appointed by a court, while exercising power under Order XXVI, rule 9 CPC, in execution proceedings filed under Order XXI, rule 32 CPC."

7. Mr. Ajay Sharma, learned Senior Advocate arguing on behalf of the petitioner, while referring to the judgment dated 8.9.2016 passed by a Coordinate Bench of this Court, Ved Parkash vs. Mool Raj Padha, contended that no local commissioner could have been appointed by the court below while exercising power under Order XXVI, rule 9 CPC, in execution proceedings filed under Order XXI, rule 32cpc, and as such, impugned order being patently illegal, deserves to be set aside.

8. Per contra, Mr. Vinod Thakur, learned counsel appearing for the respondents, while referring to the judgment passed in Som Nath vs. Gurdev, Civil Revision No. 69 of 2015 (decided on 8.5.2017) (2017) 3 Him LR 1413 and Paras Ram vs. Om Parkash and another, CMPMO No. 367 of 2017, decided on 29.3.2018, contended that the executing court with a view to give effect to the orders, sought to be executed, is well within its power to appoint a local commissioner, exercising power under Order XXVI, rule 9 CPC in execution proceedings filed under Order XXI, rule 32 CPC.

9. This court finds from the record that judgment and decree sought to be executed by judgment debtor were passed in the year 2012. There is nothing on record to suggest that from the year 2012 to 2015, judgment debtor made any attempt to raise construction on the suit land despite there being restraint order. No doubt, pleadings as have been adduced on record, if perused juxtaposing judgment and decree sought to be executed, it can be safely concluded that the parties are adjoining land owners but the question, which needs consideration here is, 'whether a court with a view to implement/execute order/judgment sought to be executed can appoint local commissioner to ascertain the factum with regard to construction, if any, in violation of the injunction orders passed during trial, or not?' Judgment rendered by a coordinate bench of this Court in CMPMO No. 19 of 2013, Ved Parkash vs. Mool Raj Padha (supra) though mandates that no local commissioner can be appointed by an executing court in execution proceedings filed for execution/implementation of judgment and decree passed by a civil court but having perused aforesaid judgment, this court finds that aforesaid finding returned by the coordinate Bench of this court is based upon general principles of law laid down in various judgments that object of local investigation is not to collect evidence but to obtain such material which from its peculiar nature can only be had on the spot and object of Order XXVI, rule 9 CPC is not to assist a party to collect evidence. Another coordinate bench of this Court in case (Vinod Thakur judgment) have though held that executing court can appoint local commissioner to ascertain the factum with regard to violation of injunction order but the reasoning assigned by the coordinate bench in the aforesaid judgment if perused, is definitely on general principles of law, laid down by Hon'ble Apex Court in various judgments that very object of appointing a local commissioner exercising power

under Order XXVI, rule 9 CPC is to collect such material, which can only be procured by visiting the spot.

10. However, having carefully perused the aforesaid judgments, this court finds that both the coordinate Benches of this Court escaped to take note of the provisions of Order XXVI, rule 18A CPC, which clearly provide the provisions of this Order shall apply to the proceedings in the execution of decree of order. Order XXVI, rule 18A is reproduced herein below:

> 18A . Application of Order to execution proceedings. –
> The provisions of this Order shall apply so far as may be, to proceedings in execution of a decree or order.

11. Besides above, S.141 CPC clearly provides that "*the procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.*" It is explicit from the provisions contained under Order XXVI, rule 18A CPC that the executing court is well within its jurisdiction to appoint a local commissioner in execution proceedings initiated under Order XXI, rule 32 CPC but next question, remains to be decided is that at what stage, an executing court can exercise this power.

12. Careful perusal of provisions contained under Order XXVI, rule 9 CPC itself suggest that the court, for the purpose of elucidating any matter in dispute, can appoint a local commissioner but, as has been held by Hon'ble Apex Court as well as this court in a catena of judgment that such power cannot be allowed to be used to assist a party to collect evidence, that is why, repeatedly, it has been held that prayer, if any, for appointment of local commissioner shall be usually considered, if required, after recording of evidence. In case, court even after having perused the pleadings and evidence led on record, fails to determine the actual controversy and in its opinion, it is required to have direct evidence from the spot or suit land, it, while exercising power under Order XXVI, rule 9 CPC, can order appointment of local commissioner. Reliance at this stage, is placed upon judgment rendered by this Court in **Liaquat Ali** vs. **Amir Mohammad & ors.**, Latest HLJ 2016 (HP) 831, wherein this Court has held as under:

> "4. Petitioner has assailed the aforesaid order on various grounds taken in the petition. Before proceeding to the merits of the matter, it needs to be reiterated that the object of local investigation is not to collect evidence, but to obtain such material, which from its peculiar nature, can be had only at the spot. The object of Order 29, Rule 9 CPC is not to assist a party to collect evidence.
>
> 5. What is the measurement of the suit passage and whether the same has been obstructed or encroached upon are matters which were required to be proved

by the petitioner by leading cogent and convincing evidence to this effect and, therefore, recourse to the appointment of Local commissioner for demarcating the suit land at this stage is impermissible as both the parties have led their evidence. Obviously the application now preferred by the petitioner is mischievous as the petitioner wants the court to collect evidence for him through the Local commissioner."

13. Reliance is also placed upon judgment rendered by Andhra High Court in case **Chakka Ranga Rao vs Molla Mustari Banu** decided on 21 June, 2006, wherein it has been held as under:

"4. Since it is well known that Executing Court can look into the plaint for understanding the decree, I have requested the learned Counsel for the revision petitioner to produce a certified copy of the plaint. The learned Counsel produced a certified copy of the plaint. The averments in the plaint show that the portion shown as A.B.C.D. and E.F.G.H. in the plan attached thereto belongs to the plaintiff and that the portion shown as B.E.G.D. in that plan belongs to defendant. The case of the respondent (plaintiff) is that the revision petitioner (defendant) who has property in between his two plots had, while constructing his house encroached into the sites belonging to him, which are shown as A.B.C.D and E.F.G.H. Unfortunately, the plaint plan does not contain measurements of the sites belonging to the parties, but the area of the portions marked as I.J.K.L. and M.N.O.P therein is shown as 5 Sq. yards each with rough measurements. It is difficult to identify those particular portions, because, distances from the eastern and western boundary of the plots belonging to the plaintiff, to locate them are not mentioned in the plaint plan.

5. The Court below was in error in dismissing the petition on the assumption that the provisions of Order 26 do not apply to proceedings in executing, because Order 26 Rule 18-A, clearly lays down that the provisions of that order also apply to proceedings in execution of a decree or order.

6. Here I feel it appropriate to refer to the observations of the Apex Court in Prathiba Singh v. Shanti Devi Prasad of its judgment reading ...Afterall a successful plaintiff should not be deprived of the fruits of decree. Resort can be had to Section 152 or Section 47 CPC depending on the facts and circumstances of each case - which of the two provisions would be more appropriate, just and convenient to invoke. Being an inadvertent error, not affecting the merits of the case, it may be corrected under Section 152 CPC by the Court which passed the decree by supplying the omission. Alternatively, the exact description of decretal property may be ascertained by the Executing Court as a question relating to execution, discharge or satisfaction of decree within the meaning of Section 47 CPC. A decree of a competent Court should not, as far as practicable, be allowed to be defeated on account of an accidental slip or omission...."

14. It is quite apparent from the aforesaid exposition of law that though an executing court has power to appoint a local commissioner exercising power under Order XXVI, rule 9 CPC in execution proceedings instituted under Order XXI, rule 32 CPC, but same can be used if required after affording opportunity of leading evidence to the parties with respect to violation, if any, of the injunction order or order/judgment sought to be executed.

15. In the case at hand, impugned order passed by court below nowhere reveals that the executing court below before appointing local commissioner, while exercising power under Order XXVI, rule 9 CPC, afforded an opportunity to the parties to lead evidence in support of their respective claims, rather, it solely, having taken note of the fact that the dispute inter se parties is qua a strip of land, which both the parties claim to be in their ownership, proceeded to appoint local commissioner, while exercising power under Order XXVI, rule 9 CPC, which action of the court below cannot be said to be legal, rather, same appears to be in contradiction of the very intent of the provisions contained under Order XXVI, rule 9 CPC, which empower a court in any suit to appoint a local commissioner to understand the controversy in an effective manner or for ascertaining the factual position on the spot, but definitely such power can be exercised by a court when evidence with regard to controversy in issue is not sufficient to arrive at a fair conclusion.

16. It is clear from the impugned order that the court below ignoring the reply filed by the non-applicant/respondent, proceeded to appoint a local commissioner under Order XXVI, rule 9 CPC, by taking into consideration the concession given by learned counsel for the respondent. Though the impugned order reveals that Shri S.S. Kanwar, Advocate gave his no objection to the application for appointment of local commissioner, but such fact has been seriously disputed by above named counsel by way of filing an affidavit in the instant proceedings (Annexure P-5). Above named counsel has categorically stated in his affidavit that he never consented for appointment of local commissioner.

17. Be that as it may, once the respondent opposed the claim for appointment of local commissioner by filing detailed reply, consent, if any, given by the counsel of the respondent, had no relevance, especially when reply filed by the respondent was not withdrawn. Since the reply filed by the respondent opposing therein appointment of local commissioner was on record, it was bounden duty of the court below to decide the application on its own merits.

18. Consequently, in view of above, this court finds merit in the present petition and accordingly, same is allowed and impugned order dated 14.11.2018 passed by learned Senior Civil Judge, Hamirpur, Himachal Pradesh in CMA No. 358/2017 in Exe. No. 20/2015 is set aside. Court below is directed to proceed with the execution proceedings and decide the

same in accordance with law by affording opportunity to the parties to lead evidence in support of their respective claims, and, thereafter, if it still feels the necessity to appoint local commissioner, it may do so by recoding reasons. Learned counsel for the parties undertake to cause presence of their respective parties before learned court below on **18.11.2020**, enabling it to proceed further with the matter, in accordance with law and the observations made in the instant judgment.

Petition stands disposed of. Pending applications, if any, also stand disposed of.

BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA. JUDGE

Mukesh Thakur and others .....Petitioners

Versus

State of Himachal Pradesh and others ....Respondents

CWPOA No. 5994 of 2019
Reserved on: November 10, 2020
Decided on: November 13, 2020

Constitution of India:- Article 226- Petitioners applied for the post of drivers in 4th Battalion Home Guards, Nahan but were not selected- Challenged the selection process on the ground of illegalities – It was held that process of selection can not be challenged by an unsuccessful candidate- Inquiry report was found conducted as per norms. Petition dismissed having no merits.

Cases referred:
Madras Institute of Development Studies and another vs. K. Sivasubramaniyan and others(2016) 1 SCC 454;
Ashok Kumar and another vs. State of Bihar and others (2017) 4 SCC 357;

For the Petitioners : Mr. Suneet Goel, Advocate.

For the Respondents : Mr. Sudhir Bhatnagar, Additional Advocate General with Mr. Kunal Thakur, Deputy Advocate General and Mr. Sunny Dhatwalia, Assistant Advocate General, for respondents Nos. 1 to 3.
Ms. Yogita Dutt Sharma, Advocate, for respondents Nos. 4 to 8.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Pursuant to notice published in the newspaper dated 18.10.2018 (Annexure A-2), petitioners alongwith other eligible candidates applied for the posts of Drivers in 4th Battalion Home Guards, Nahan. Petitioners being eligible candidates were called for recruitment process vide separate communications (Annexure A-3 and Annexure A-4), which was scheduled to be held with effect from. 15.10.2018 to 18.10.2018. Fitness test was conducted on 15.10.2018; driving test on 16.10.2018 and written test on 17.10.2018. Though initially 500 candidates participated in the aforesaid selection process conducted by the respondents for 15 posts of Drivers, however, only 122 candidates including the petitioners appeared/qualified in the written examination. After conducting the driving test/written examination, respondents issued list of 15 selected candidates for post in question (Annexure A-1). Since the names of the petitioners did not appear in aforesaid selection list issued by respondents, and they were astonished to know that list contains names of certain persons (candidates at Sr. Nos.1,2, 4 8 and 11 /respondents Nos. 4 to 8 herein), who had either failed in the driving/fitness test or had not even participated in the selection process, petitioners namely Dimple Singh, Ashik Khan Mohammad and Mukesh Thakur lodged a written complaint to Hon'ble the Chief Minister, Himachal Pradesh and Inspector-General, Home Guards (Annexure A-5, A-6 and A-7), with regard to aforesaid illegalities and requested to take action in accordance with law. Though petitioner namely Mukesh Thakur applied for information regarding marks obtained by respondent No.5 Rahul Thakur in skill and written test alongwith copy of video-graphy made at the time of driving/skill test held on 15.10.2018 but such information is still awaited. Report with regard to alleged illegalities and irregularities committed in the aforesaid selection process also came to be published in certain newspapers as is evident from one newspaper report annexed as Annexure A-9. Since no action came to be taken on the complaints having been made by the petitioners, they approached erstwhile Himachal Pradesh Administrative Tribunal by way of OA No. 698 of 2018, which on its transfer to this Court stands re-registered as CWPOA No. 5944 of 2019 praying therein for following main reliefs:

> "A. This Hon'ble Tribunal may very kindly be pleased to call for entire records pertaining to the case within the power and possession of the respondents;
> B. This Hon'ble Tribunal may very kindly be [pleased to quash the selection process for the post of driver in the 4th Battalion Home Guards, Nahan, particularly the selection list of candidates for the said pose (Annexure A-1);
> C. Direct the respondent authorities to carry out proper inquiry qua the into the illegalities in making selection of the candidates for the post in question."

19. Respondents Nos. 1 to 3 while denying aforesaid allegations have claimed in their reply that the selection process under challenge, was conducted in a most fair and transparent manner. Respondents have claimed that the Enrolment Board constituted by Commandant

General Home Guards and Civil Defense, Himachal Pradesh vide order dated 25.9.2018 conducted physical, driving and written tests with full transparency and impartiality. Respondents have submitted that since the entire process was conduced as per norms prescribed for selection process and in terms of Rules occupying the field, petition having been filed by the petitioners deserves dismissal being without any merit.

20. Respondents nos. 4 to 8 also filed a joint reply refuting therein the allegations of the petitioners. Aforesaid respondents have not only claimed that they participated in selection process alongwith the petitioners but have stated that they being more meritorious, have been rightly selected for the posts of Drivers.

21. Learned Tribunal below having taken note of the averments contained in the petition, vide order dated 6.12.2018, while granting time to the respondents, ordered that selection of respondents Nos. 4 to 8 as drivers on the establishment of 4th Battalion Nahan as per list of selected candidates, Annexure A-1, shall be subject to the final outcome of the petition.

22. I have heard the parties and gone through the record.

23. In nutshell, grievance of the petitioners as emerges from the pleadings adduced on record is that the respondents, while carrying out selection for the posts of drivers in 4th Battalion, Home Guards, have committed serious illegalities and irregularities and have appointed the persons (respondents Nos. 4 to 8) who had either failed in the diving/fitness test or had not at all appeared in the selection process.

24. Respondents Nos. 1 to 3 with a view to refute the aforesaid allegations of the petitioners and to justify the selection of respondents Nos. 4 to 8, have placed on record various documents alongwith their reply, perusal whereof clearly reveals that though intimation with regard to selection against 15 posts of drivers was given in newspaper, Annexure A-2, but in such news clipping, terms and conditions i.e. eligibility, age critera, physical standards and educational qualifications were clearly mentioned. Apart from this, terms and conditions stood clearly mentioned in the form of enrollment, which was required to be furnished at the time of selection and as such, there appears to be no force in the claim of the petitioners that they were not apprised with regard to terms and conditions and standards to be adopted by respondents during selection process. Similarly, careful perusal of Annexures R-1 and R-2 annexed with reply filed by respondents Nos. 1 to 3, clearly reveals that vide office order dated 20.9.2018 and corrigendum dated 6.10.2018, respondents while constituting Enrolment Board, specifically provided marks to be awarded by the Board against each criterion. Vide corrigendum dated 6.10.2018 (Annexure R-2) separate Enrolment Boards came to be constituted for each District headed by the officer of the rank of Commandant. Respondents also placed on record an enrolment form submitted by one of the petitioners namely Mukesh Thakur to demonstrate that

the terms and conditions of enrolment were also printed on the application form submitted by each individual with his signatures. Perusal of aforesaid form further reveals that marks were awarded on same form by the Enrolment Board against each criterion. Though, in the case at hand, petitioners have claimed that information sought for by them under RTI Act is yet awaited but delay, if any in furnishing information cannot be a ground/reason for this Court to infer that the respondents committed illegalities and irregularities, while selecting respondents Nos. 4 to 8 in the selection process, wherein admittedly petitioners had also participated. Save and except bald statements/allegations having been made by the petitioners, there is no concrete evidence adduced on record by them suggestive of the fact that respondents Nos. 4 to 8 had either not cleared the fitness/driving test or not appeared in the selection process. There is no plausible reason rendered on record by the petitioners, which can persuade this Court to disbelieve the version put forth by the respondents in their reply, which has been admittedly filed under the signatures and affidavit of Commandant, Home Guard, 4th Battalion. Though, an attempt has been made on behalf of petitioners to refute the submissions/contentions raised by the respondents in their reply by way of filing rejoinder, but rejoinder, if read in its entirety, shows that besides reiterating their stand in the petition, no fresh material has been placed on record persuading this court to believe their version as put forth in the petition. Though this Court having perused reply filed on behalf of the respondents has no hesitation to conclude that the petitioners after having been declared unsuccessful in the selection process, have made an attempt to stall the entire selection process on very flimsy grounds, but even otherwise, petitioners after having been declared unsuccessful in the selection process cannot be permitted to raise dispute with regard to method of selection adopted by the Enrolment Board. Though Mr. Suneet Goel, learned counsel for the petitioners, while making this court peruse documents annexed with the petition, made a serious attempt to persuade this Court that since the petitioners during selection process itself had apprised authorities concerned with regard to the alleged illegalities, petitioners cannot be estopped from filing this petition on the ground that they had already participated in the selection process but having perused averments contained in the petition as well as Annexure A-1 i.e. list of selected candidates for the posts of Drivers in 4th Battalion, this Court finds no merit in the aforesaid submission of Mr. Goel and as such, same is rejected being devoid of merit. It stands categorically averred in the petition that petitioners after having noticed names of respondents Nos. 4 to 8 in the selection list, which was admittedly signed in the month of November, 2018, lodged complaint with the Hon'ble Chief Minister and the Inspector-General, Home Guards. As per own case of the petitioners, interview/ driving test for the post was held on 15.10.2020 to 17.10.2018 but there is no material available on record suggestive of the fact that complaint if any ever came to be made by

the petitioners during aforesaid period and as such, subsequent representations/complaints by the petitioners can be said to be an afterthought.

25. It is settled law that a process of selection cannot be challenged by an unsuccessful candidate by pointing to certain irregularities here and there in the process of which he was aware, once the result is not to his liking. Relief, in such a case, is to be declined by applying the principles of estoppel, acquiescence and/or waiver. Reference in this regard can conveniently be made to the two recent judgments of the Hon'ble Supreme Court.

> "10. In **Madras Institute of Development Studies and another** vs. **K. Sivasubramaniyan and others**(2016) 1 SCC 454, the Hon'ble Supreme Court has held as under:
>
> > 12. The contention of the respondent no.1 that the short- listing of the candidates was done by few professors bypassing the Director and the Chairman does not appear to be correct. From perusal of the documents available on record it appears that short-listing of the candidates was done by the Director in consultation with the Chairman and also senior Professors. Further it appears that the Committee constituted for the purpose of selection consists of eminent Scientists, Professor of Economic Studies and Planning and other members. The integrity of these members of the Committee has not been doubted by the respondent- writ petitioner. It is well settled that the decision of the Academic Authorities about the suitability of a candidate to be appointed as Associate Professor in a research institute cannot normally be examined by the High Court under its writ jurisdiction. Having regard to the fact that the candidates so selected possessed all requisite qualifications and experience and, therefore, their appointment cannot be questioned on the ground of lack of qualification and experience. The High Court ought not to have interfered with the decision of the Institute in appointing respondent nos. 2 to 4 on the post of Associate Professor.
> >
> > 13. Be that as it may, the respondent, without raising any objection to the alleged variations in the contents of the advertisement and the Rules, submitted his application and participated in the selection process by appearing before the Committee of experts. It was only after he was not selected for appointment, turned around and challenged the very selection process. Curiously enough, in the writ petition the only relief sought for is to quash the order of appointment without seeking any relief as regards his candidature and entitlement to the said post.
> >
> > 14. The question as to whether a person who consciously takes part in the process of selection can turn around and question the method of selection is no longer res integra.
> >
> > 15. In Dr. G. Sarana vs. University of Lucknow & Ors., (1976) 3 SCC 585, a similar question came for consideration before a three Judges Bench of this

Court where the fact was that the petitioner had applied to the post of Professor of Athropology in the University of Lucknow. After having appeared before the Selection Committee but on his failure to get appointed, the petitioner rushed to the High Court pleading bias against him of the three experts in the Selection Committee consisting of five members. He also alleged doubt in the constitution of the Committee. Rejecting the contention, the Court held: (SCC P. 591, para 15) "15. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee. This view gains strength from a decision of this Court in Manak Lal vs. Prem Chand Singhvi, AIR 1957 SC 425 where in more or less similar circumstances, it was held that the failure of the appellant to take the identical plea at the earlier stage of the proceedings created an effective bar of waiver against him. The following observations made therein are worth quoting: (AIR p.432, para 9) '9. ....It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of r raising the present technical point.' "

16. In Madan Lal & Ors. vs. State of J & K & Ors. (1995) 3 SCC 486, similar view has been reiterated by the Bench which held that: (SCC p. 493, para 9) "9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of Om Prakash Shukla v. Akhilesh Kumar Shukla 1986 Supp SCC 285, it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the

said examination, r the High Court should not have granted any relief to such a petitioner."

17. In Manish Kumar Shahi vs. State of Bihar, (2010) 12 SCC 576, this Court reiterated the principle laid down in the earlier judgments and observed: (SCC p. 584, para 16) "16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."

18. In the case of Ramesh Chandra Shah and others vs. Anil Joshi and others, (2013) 11 SCC 309, recently a Bench of this Court following the earlier decisions held as under: (SCC p. 320, para 24) "24. In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents."

19. So far as the finding recorded by the Division Bench on the question of maintainability of the writ petition on the ground that the appellant Institute is a 'State' within the meaning of Article 12 of the Constitution, we are not bound to go into that question, which is kept open."

26. In **Ashok Kumar and another** vs. **State of Bihar and others** (2017) 4 SCC 357, a Bench of three Hon'ble Judges of the Hon'ble Supreme Court, has held as under:

"13. The law on the subject has been crystalized in several decisions of this Court. In Chandra Prakash Tiwari v. Shakuntala Shukla[4], this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In Union of India v. S. Vinodh Kumar (2007) 8 SCC 100, this Court held that :

"18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same (See also Munindra Kumar v. Rajiv Govil (1991) 3 SCC 368 and Rashmi Mishra v. M.P. Public Service Commission (2006) 12 SCC 724)".

14. The same view was reiterated in Amlan Jyoti Borooah (2009) 3 SCC 227, where it was held to be well settled that candidates who have taken part in a selection process knowing fully well the procedure laid down therein are not entitled to question it upon being declared to be unsuccessful.

15. In Manish Kumar Shah v. State of Bihar (2010) 12 SCC 576, the same principle was reiterated in the following observations: (SCC p.584, para 16) "16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the Petitioner is not entitled to challenge the criteria or process of selection. Surely, if the Petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The Petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the Petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the Judgments in Madan Lal v.State of J. and K. (1995) 3 SCC 486, Marripati Nagaraja v. State of Andhra Pradesh and Ors. (2007) 11 SCC 522, Dhananjay Malik and Ors. v.State of Uttaranchal and Ors.(2008) 4 SCC 171, Amlan Jyoti Borooah v. State of Assam (2009) 3 SCC 227 and K.A. Nagamani v. Indian Airlines and Ors. (2009) 5 SCC 515."

16. In Vijendra Kumar Verma v. Public Service Commission, (2011) 1 SCC 150, candidates who had participated in the selection process were aware that they were required to possess certain specific qualifications in computer operations. The appellants had appeared in the selection process and after participating in the interview sought to challenge the selection process as being without jurisdiction. This was held to be impermissible.

17. In Ramesh Chandra Shah v. Anil Joshi, (2013) 11 SCC 309, candidates who were competing for the post of Physiotherapist in the State of Uttrakhand participated in a written examination held in pursuance of an advertisement. This Court held that if they had cleared the test, the respondents would not have raised any objection to the selection process or to the methodology adopted. Having taken a chance of selection, it was held that the respondents were disentitled to seek relief under Article 226 and would be deemed to have waived their right to challenge the advertisement or the procedure of selection. This Court held that: (SCC p. 318, para 18) "18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome."

> 18. In Chandigarh Administration v. Jasmine Kaur[11], it was held that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn around and complain that the process of selection was unfair after knowing of his or her non- selection. In Pradeep Kumar Rai v. Dinesh Kumar Pandey (2015) 11 SCC 493,this Court held that: (SCC p.500, para17) :
>
> "17. Moreover, we would concur with the Division Bench on one more point that the appellants had r participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted."
>
> This principle has been reiterated in a recent judgment in Madras Institute of Development v. S.K. Shiva Subaramanyam's case (supra).".

27. Since it stands duly established on record that the writ petitioners before laying challenge to selection process had participated in selection process without any demur, now it is not open for them to lay challenge to selection process after having been declared unsuccessful that too on the bald and baseless allegations.

28. Leaving everything aside this court finds from the record that pursuant to complaints filed by the petitioners to Hon'ble Chief Minister and Inspector-General, Home Guards, enquiry came to be held by Deputy Commandant General, Home Guards, HP, Shimla. After having discovered factum with regard to constitution of enquiry committee this Court directed learned Additional Advocate General vide order dated 8.10.2020 to place on record report of Enquiry Officer appointed by State Government to look into allegations of corruption in the selection process. Pursuant to order dated 8.10.2020, Additional Director-General-cum-Commandant General, Fire Services, Himachal Pradesh by way of an affidavit dated 16.10.2020 has placed on record, enquiry report submitted by Enquiry Officer namely Anuj Tomer, Deputy Commandant-General, Himachal Pradesh Home Guards, Shimla. Perusal of enquiry report, as has been taken note herein above, clearly reveals that Enquiry Officer as named herein above was directed to enquire into media reports regarding illegalities committed in the recruitment of Volunteers/Drivers in District Sirmaur, Himachal Pradesh. Enquiry report, if read in its entirety clearly reveals that Enquiry Officer while taking note of grievances of the petitioners as have been aired in the present petition not only recorded statements of petitioners/complainants but

also dealt the same point wise. Enquiry Officer in his report has recorded that documents/record pertaining to selection process such as original forms, answer sheets and photographs of selection process held in the office of Commandant, 4th Battalion, Home Guards Nahan were carefully examined and statements of Members of the Selection Board were recorded after affording them opportunity of being heard. Enquiry Officer has concluded that as per forms of candidates, all the selected candidates have been declared successful including the ones named by the petitioners, by the MVI, who conducted the driving test.

29. Mr. Goel, while referring to aforesaid conclusion of Enquiry Officer though argued that since the entire selection process is under clout, same is required to be quashed, but having perused findings recorded by Enquiry Officer before arriving at a final conclusion, which clearly reveal that none of the allegations of the petitioners was found to be genuine, coupled with the fact that recommendation to conduct fresh selection process was made solely with a view to dispel the doubts created in the minds of general public on account of publication in the media, this court finds no force in the aforesaid submission of Mr. Goel.

30. Since the petitioners were fully aware of the method of selection, criteria fixed by the respondents for selection to the post concerned and further that the allegations made by the petitioners have been found to be baseless, this court sees no occasion to interfere with the selection process. Besides this, in view of law laid down by Hon'ble Apex Court (supra), petitioners being unsuccessful candidates cannot be allowed to challenge the selection process, especially when they have failed to point out any illegality in the selection process, the selection process requires to be upheld.

31. In view of above petition is dismissed being devoid of any merit. Pending applications, if any, stand disposed of. Interim orders quashed.

BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA. JUDGE

Hem Raj .....Petitioner

Versus

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

CWPOA No. 7624 of 2019
Reserved on: November 5, 2020
Decided on: November 9, 2020

Constitution of India:- Article 226- Petitioner working as Patwari prayed for grant of pay band of Rs. 10300-34800 + 3200 grade pay to him from the date of pay scale stood reviewed vide notification dated 4.10.2012 by the Finance Department along with benefits- It was held that due to arbitrary approach, petitioner was denied for required pay scale which was granted to

similarly situated persons - He does not fall in the category of Patwari Technician as his services stood regularized – There can not be any distinction on the ground that regularization in terms of policy framed by Government can not be equated with Patwaris, who were appointed in terms of Recruitment and Promotion Rules – Petition allowed. Title: Hem Raj vs. The State of H.P. and others Page-306

Cases referred:
Shiba Kumar Dutta and others Vs. Union of India and others, (1997) 3 SCC 545;
Bhagwati Prasad versus Delhi State Mineral Development Corporation , (1990) 1 SCC 361;
K.T. Veerappa v. State of Karnataka (SC), 2006 (5) SLR;
Dr. Y.S. Parmar Uni. Of Hort. & Forst vs. Mr. Satish Chand, 2017(2) Him L.R. (DB) 877;

For the Petitioner : Mr. A.K. Gupta, Advocate.

For the Respondents : Mr. Arvind Sharma, Additional Advocate General with Mr. Kunal Thakur, Deputy Advocate General and Mr. Sunny Dhatwalia, Assistant Advocate General.

THROUGH VIDEO-CONFERENCING

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant petition, prayer has been made on behalf of the petitioner to issue directions to the respondents to grant pay band of Rs.10300-34800+3200 grade pay to him from the date said pay scale stood revised vide Notification dated 4.10.2012 by the Finance Department alongwith benefits incidental thereto.

32. Petitioner was appointed as a Patwari on daily wage basis and thereafter his services were regularised vide office order dated 17.3.2004 issued by Superintending Engineer, IPH Circle, Kullu in the pay scale of Rs.3120-5160, which was subsequently revised to Rs. 5910-20200 from the year 2006. Vide Notification dated 28.9.2012, Annexure P-2, Governor, Himachal Pradesh, exercising powers vested under rule-9 of HP Civil Services (Category/Post-wise Revised Pay) Rules, 2012 read with rule-3 of the Rules ibid, revised the pay scale of category of Patwari from Rs.5910-20200+1900 Grade Pay to Rs.10300-34800+3200 grade pay but since the aforesaid revised pay scale/band was not given to the petitioner, he approached erstwhile Himachal Pradesh Administrative Tribunal by way of OA No. 2706 of 2016, which now stands transferred to this Court and re-registered as CWPOA No. 7624 of 2019, praying therein for following main relief(s):

> "That the respondents may be ordered to grant pay band of Rs.10300-34800/- to the applicant from the date from which the said pay scale has been revised

by the Finance Department i.e. w.e.f. 4.10.2012 with grade pay of Rs.3200/-, with all the benefits incidental thereof."

33. Having heard learned counsel for the parties and perused the material available on record, especially the reply filed by the respondents Nos. 1 to 5, this Court finds that there is no dispute inter se parties that the services of the petitioner stood regularised vide office order dated 17.3.2004 in the pay scale of Rs.3120-5160, which was further revised to Rs.5910-20200 from the year 2006. Similarly, it is not in dispute that aforesaid scale of Rs. 5910-20200 was further revised by the Government of Himachal Pradesh by issuing Notification dated 28.9.2012 to Rs.10300-34800+3200 grade pay. Respondents, in their reply, while refuting the claim of the petitioner have made an attempt to make out a case that the issue with regard to grant of pay scale lies in the exclusive domain of the Government and in this matter, courts cannot interfere. Besides above, respondents, while placing reliance upon the judgments passed by Hon'ble Apex Court as well as this Court, have stated that no direction, if any, can be issued by courts to grant a particular pay scale to an employee, rather, only direction to consider case of an employee can be issued. There cannot be any quarrel with the aforesaid proposition of law that the State Government has the exclusive jurisdiction to grant pay scale to a particular category of employees and courts cannot interfere unless there is invidious distinction between similarly situate persons or there is arbitrariness as has been held by Hon'ble Apex Court in **Shiba Kumar Dutta and others** Vs. **Union of India and others**, (1997) 3 SCC 545. Similar view has been taken in a judgment dated 28.5.2014 by this Court in LPA No. 146 of 2013 titled **State of Himachal Pradesh and others** vs. **Navneet Gupta,** wherein it has been held that the court cannot issue a writ of mandamus commanding authorities to give pay scale and at best direction can be issued to the authorities to consider the case of an employee for releasing a particular pay scale.

34. Petitioner, in the case at hand has approached this Court against the arbitrary approach of the respondents whereby he has been denied revised pay scale of Rs.10300-34800+3200 grade pay, which has been granted to similarly situate persons. As per own case of the respondents, petitioner was appointed as a Patwari in the pay scale of Rs.3120-5160 but scale of Rs. 10300-34800+3200 grade pay as is being paid to other Patwaris has been denied to the petitioner on the ground that the pay scale of Rs.10300-34800+3200 grade pay is payable to Technical Grade-I (Patwari) and since the petitioner is still working as a Junior Technician Patwari in the pay scale of Rs.5910-20200 +2400 Grade Pay, he is not entitled to aforesaid revised pay scale. Besides above, respondents have stated in their reply that the petitioner is not entitled to pay scale of Rs.10300-34800+3200 grade pay as per Finance Department letter

and this pay scale is applicable to trained Patwaris after two years, whereas petitioner is an untrained Patwari.

35. However, having carefully perused the material available on record, this Court finds no force in the grounds raised by the respondents, while rejecting claim of the petitioner. Respondents have averred in their reply that the category of petitioner i.e. Patwari(s) not recruited strictly as per Recruitment and Promotion Rules but regularised as per regularisation policy is/are not entitled to pay scale of Rs. 10300-34800+3200 grade pay. As per respondents, pay band/scale of Rs.10300-34800+3200 grade pay has been granted to certain Patwaris as per Finance Department letter dated 25.8.2015 (Annexure R-1). It has been further averred in the reply filed by the respondents that the category of petitioner being Technician has been bifurcated in the ratio of 20:30:50 in the pay scale of Rs.4550-7200, 4020-6200 and 3120-5160, respectively in the revised pay rules. As per Notification dated 28.9.2012, revised pay scale of Junior Technician is Rs.5910-20200+2400 grade pay with effect from 1.10.2012. As per respondents, petitioner would pay scale of Rs.10300-34800+3200 grade pay as per seniority, when he will be upgraded as Junior Technician Grade I. Besides above, respondents have stated that as per Recruitment and Promotion Rules, minimum educational qualification for appointment to the post of Patwari is matriculation or higher secondary part-I and person must have passed Patwar examination conducted by Himachal Pradesh Revenue Department.

36. Having perused order dated 17.3.2004 (Annexure P-1), whereby petitioner's services came to be regularised, this Court finds that the petitioner does not fall in the category of Patwari Technician, category of which was bifurcated in the ratio of 20:30:50 by creating three-tier pay scales of Rs.4550-7220, 4020-6200 and 3120-5160 in the pre-revised pay rules, as such, his case cannot be said to be covered under Notification dated 28.9.2012, whereby pay scale of Junior Technician came to be revised, rather, case of the petitioner is/was required to be considered in light of Notification dated 28.9.2012, Annexure P-2, whereby pay band of Patwari came to be revised from 5910-20200 to Rs.10300-34800+3200 grade pay with effect from 1.10.2012. Otherwise also, question with regard to requisite qualification, if any, possessed by the petitioner cannot be allowed to be raised at this stage, especially when it was not taken into consideration at the time of initial appointment and regularisation. Once services of the petitioner have been regularised as Patwari, his legitimate claim cannot be allowed to be defeated on the ground of his having not possessed requisite qualification.

37. By now, it is well settled that qualification is to be seen at the time of initial appointment. Their Lordships of the Hon'ble Supreme Court in **Bhagwati Prasad versus Delhi State Mineral Development Corporation** , (1990) 1 SCC 361 have held that practical experience would always aid the person to effectively discharge the duties and is a sure guide

to assess the suitability. Their Lordships have further held that 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 and once the appointments are made as daily rated workers and they are allowed to work for a considerable length of time, it would be hard and harsh to deny them the confirmation in the respective posts on the ground that they lack the prescribed educational qualification. Their Lordships have 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 between 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 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 Rupees 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."

38. During the pendency of this case, this Court having perused record, deemed it necessary to offer an opportunity to the respondents to rectify its mistake and as such, directed learned Additional Advocate General to have instructions vide order dated 8.10.2020, but interestingly, respondents again vide communication dated 2.11.2020, issued under the signatures of Superintending Engineer, Jal Shakti Circle, Kullu, which is taken on record, have reiterated that the petitioner was not recruited strictly as per Recruitment and Promotion Rules, but regularised as per regularisation policy hence, he is not entitled to pay band/scale of Rs.10300-34800+3200 grade pay. As per respondents, aforesaid pay scale stands granted to the Patwaris who possess minimum qualification as prescribed under Recruitment and Promotion Rules but, as has been observed herein above, such plea is not available to the respondents at this stage. Once, it is an admitted fact that the services of the petitioner were regularised as a Patwari, he cannot be discriminated from the Patwaris who subsequently came to be appointed or were appointed in terms of Recruitment and Promotion Rules on the ground of his having not possessed requisite qualification. By becoming Patwari, petitioner has become similarly situate to that of other Patwaris, who may have been appointed in terms of Recruitment and Promotion Rules. There cannot be any distinction that the Patwaris, who were regularised in terms of regularisation policy framed by the Government, cannot be equated with Patwaris, who came to be appointed in terms of Recruitment and Promotion Rules.

39. Reliance is placed upon judgment of Hon'ble Apex Court rendered in **K.T. Veerappa** v. **State of Karnataka** (SC), 2006 (5) SLR, wherein it has been held as under:

> "15. In the present cases, in compliance to the judgment of the learned Single Judge of the High Court, the Vice- Chancellor of the Mysore University constituted a Committee headed by Shri Hiriyanna. The said Committee, in its Report dated 8.6.1991, has recorded the obversvations that the details of the pay scales assigned by the 'Muddappa Committee', 'the Manjunath Committee', 'the Acharya Committee', 'the Gopala Reddy Committee' as also the pay scales given effect to from 1.1.1977 and the claims of the appellants, on individual basis, could perhaps have been attended to by the University itself after the 'Muddappa Committee' made its recommendations. The Vice-Chancellor and Registrar of the Mysore University, while appearing before the Division Bench of the Karnataka High Court in C.C.C. Nos. 84 to 103 of 1992 in compliance to the Order dated 16th April, 1992 had brought to the notice of the Bench that the direction issued by the learned Single Judge in W.A. Nos.2220 to 2239/1989 dated 18.4.1990 and 29.1.1991 had already been complied with and arrears of salary had been paid to the employees of the University, who filed the said Writ Petitions. Thereafter, the respondent-University submitted certain proposed amendments to the Statute and the same were sent to the State Government for approval. The State Government, for the reasons best

known to it, till date has not been able to state any good reason as to why the amendment of the Statute as proposed by the University in regard to the fixation of the pay scales of its employees could not have been approved by the competent authority. The Vice-Chancellor in its affidavit dated 25.1.2000 filed in the Writ Appeal Nos. 7007-55/1999 has categorically stated that the respondent-University, in its Meeting held on 17.4.1999, decided to comply with the orders of the Court and also to extend the benefit of the revised pay scale with effect from 1.1.1977 to those employees who are eligible for such benefits and have not gone to the Court. This decision was taken on the representation submitted by the appellants.

16. The defence of the State Government that as the appellants were not the petitioners in the writ petition filed by 23 employees of the respondent-University to whom the benefit of revised pay scales was granted by the Court, the appellants are estopped from raising their claim of revised pay scales in the year 1992-94, is wholly unjustified, patently irrational, arbitrary and discriminatory. As noticed in the earlier part of this judgment, revised pay scales were given to those 23 employees in the year 1991 when the contempt proceedings were initiated against the Vice-Chancellor and the Registrar of the University of Mysore. The benefits having been given to 23 employees of the University in compliance with the decision dated 21.6.1989 recorded by the learned Single Judge in W. P. Nos.21487-21506/1982, it was expected that without resorting to any of the methods the other employees identically placed, including the appellants, would have been given the same benefits, which would have avoided not only unnecessary litigation but also the movement of files and papers which only waste public time.

17. Shri Sobha Nambisan, Principal Secretary to Government, Education Department (Higher Education), Government of Karnataka, in his latest affidavit dated 6.3.2006 filed in these proceedings has stated that after 1.1.1977, the Government of Karnataka has revised the pay scales of employees of State Government in 1982, 1987, 1994 and 1999. From 1.1.1977 to 2006, the dearness allowance, house rent allowance and other allowances have also been revised. The revision of pay scales, dearness allowance, house rent allowance and other allowances extended to the State Government employees were also extended to the University employees from time to time. Moreover, a large number of Mysore University employees were promoted in terms of the time-bound promotion schemes of 10 years, 15 years and 20 years in terms of the Government Orders issued from time to time. The additional financial implications of Rs.60 lakhs will have to be borne by the State Government. He has categorically stated that the revision of pay scales extended to the employees of State Government time and again will also be extended to all the University employees.

18. In our view, the impugned judgment of the High Court in W. A. Nos. 7007-55/1999 dated 8.3.2000 is not legally sustainable. It is, accordingly, quashed and set aside."

40. Reliance is also placed upon a judgment of this Court in **Dr. Y.S. Parmar Uni. Of Hort. & Forst** vs. **Mr. Satish Chand**, 2017(2) Him L.R. (DB) 877, wherein this Court has held as under:

"13. Careful perusal of impugned judgment passed by learned Single Judge suggests that the same is based upon correct appreciation of law having been laid down by the Hon'ble Apex Court in a catena of judgments. Hon'ble Apex Court has repeatedly observed that the principle of "equal pay for equal work" is not a mere slogan but a fundamental right which can be enforced through constitutional remedies prescribed therein. Hence, learned Single Judge rightly concluded that determining of grant of pay scale is not the sole prerogative of the executive, rather an aggrieved employee has every right to knock the doors of justice for the redressal of his grievances."

41. At the cost of repetition, it may be observed that since there is nothing on record to suggest that the petitioner falls in the category of Patwari Technician, his pay cannot be regulated as per Notification dated 28.9.2012.

42. In view of the detailed discussion supra, I find sufficient merit in the petition at hand, which is accordingly allowed. Respondents are directed to grant pay scale/band of Rs.10300-34800+3200 grade pay to the petitioner from the date said pay scale/band has been made applicable to all other Patwaris, with all consequential benefits.

Pending applications, if any, stand disposed of.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR. JUDGE AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, JUDGE

Panch Ram & others ...Appellants

versus

State of H.P. ....Respondent.

Cr. Appeal No. 31 of 2020
Reserved on : 5.11.2020
Date of decision 10th November, 2020

Indian Penal Code – Sections 147, 148 302 read with section 149 – Both the deceased with their friends on Holi festival assembled in a fields, saw the accused persons rubbing cannabis plants on their hands, the act was protested – After some time all the accused came with Darats and Dandas , inflicted blows and fled away. Two injured persons Rinku and Ashwani died –

Trial court convicted all the accused persons – Order of conviction challenged – It was held that oral, documentary and scientific evidence is in favour of prosecution –Recovery of weapons of offence duly stood proved, evidence of witnesses found reliable and corroborative – The judgment of trial court found based on true appreciation of evidence – Appeal dismissed.

For the appellants: Ms. Shradha Karol, Advocate

For the respondent: Mr. Hemant Vaid, Addl. A.G.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge:

The instant appeal, stands directed, by the appellants, against the judgment of their conviction, as, pronounced, on, 5.9.2019, by the learned Additional Sessions Judge, Hamirpur, upon, Session Trial No. 11 of 2016, wherethrough, findings, of conviction, became returned, upon, the appellants, for, theirs committing offence(s) punishable, under Section 147, 148, and, under Sections 302, read with Section 149, of the Indian Penal Code, (i) and, also therethrough, the, accused/appellants, stood sentenced, to, undergo rigorous imprisonment extendable, for, a period of two years, and, to pay a fine of Rs. 5000/- each, and, in default of payment of the fine amount, they become sentenced, to, further undergo simple imprisonment, for, a period of six months, for, commission of offence, punishable under Sections 147, and, 148 of the Indian Penal Code, and, besides each stood sentenced, to, undergo rigorous imprisonment, for, life, and, to pay a fine of Rs. 15,000/- each, and, in default of payment, of, fine amount, each stood further sentenced, to, undergo simple imprisonment for a period of one year, for, commission, of, an offence punishable under Section 302, read with Section 149, of, the Indian Penal Code. The appellants becoming aggrieved, from, the afore verdict of conviction, made upon, them, and, also from the imposition, upon them, of, the afore sentences, hence thereagainst, cast a challenge, through, theirs instituting the instant appeal, before this Court.

2. The genesis of the prosecution case, as, becomes encapsulated, in the statement, of, one Vinay Kumar, statement whereof is comprised, in, Ext. PW-9/A, makes narrations therein, (i) that, on 23.3.2016, his, on account of Holi festival, falling on the afore date, hence not preceding to work, rather his as, of, earlier, along with Rinku, Ashu, Panku and Subhash, assembling in the fields of Rinku, and, theirs preparing meat, (ii) and, at about 6.30 PM, on the afore date, 3-4 Nepalis coming near the afore site, and, theirs thereat proceeding, to, rub cannabis plant with their hands. The afore act of the Nepali persons, are narrated therein, to become protested by Rinku, and, thereupon the Nepalis, leaving the site, and, returning to the site, at, about 7.30 PM, along with 7-8 persons, and, all of them, carrying

Darats, axes and dandas. Moreover, he also narrates therein, that he along with PW-1 Pankaj Kumar, witnessing the afore Nepalis, inflicting blows, with user of afore weapons, of, offence, upon, Ashu and Rinku, and, in sequel thereto, blood oozing therefrom. He further makes a narration therein, qua hence theirs taking, to, hide themselves, near the wheat fields, and, owing to fear, theirs raising, a, hue and cry. Upon theirs raising, a, hue and cry, the Nepalis are, echoed therein, to flee from the spot, towards their house/shelter(s), and, thereafter, upon theirs reaching the spot, theirs noticing that Ashu, and, Rinku lying on the ground, in an injured condition, and, blood oozing from their injuries. Moreover, a further narration is also carried therein, that one axe, pieces of dandas, hence also lying on the spot. Furthermore, he states that slippers and plastic boots, were, also found lying on the spot. The villagers upon hearing their hue(s) , and, cry(ies), are echoed therein, to, also arrive at the spot. Both Ashu, and, Rinku were taken to Regional Hospital, Hamirpur, and, on reaching there, injured Rinku was declared brought dead, and, injured Ashwani was referred to PGI Hospital, but enroute, at place Bangana, he is stated to succumb, to, his injuries.

3. In pursuance, to, the recording of Ext. PW-9/A, a formal FIR, bearing No. 22 of 2016, borne in Ext. PW-33/A, became registered with the Police Station Nadaun, District Hamirpur, H.P.

4. The learned counsel for the appellants, makes a vehement submission before this Court, that, since the identity, of, the accused, being not known either to PW-1, Pankaj Kumar, or, to, PW-9 Vinay Kumar, who respectively stepped into witness box as PW-1, and, as PW-9, (i) thereupon the identification(s), of, the accused, by both the afore prosecution witnesses, only in court, becoming legally frail, imperatively for, (a) want of theirs, in their respectively made previous statements, disclosing therein, the key physical attributes, of, accused, for, thereafter theirs becoming enabled, to, in a valid test identification parade, hence, held by the Investigating Officer concerned, to, identify the accused, (b) thereupon reiteratedly, the afore identification in court, of the accused, by PW-1, and, by PW-9, becoming impeachable, (c) whereupon the alleged incriminatory participation, of the accused, as, becomes anchored, upon, the purported ocular account, hence rendered, by PW-1, and, PW-9, also concomitantly becomes impeachable. Moreover, the ocular account rendered, vis-a-vis, the occurrence by PW-1 and PW-9 becomes construable to be lacking, in, any probative sanctity or evidentiary vigors.

5. However, the afore submission, as, made before this Court, would hence hold tenacity only upon, a thorough, and, incisive reading, of, the testimony, rendered by PW-1, or by the Investigating Officer,hence unraveling, vis-a-vis, its/theirs containing echoings, in consonance with, the afore made submission, (a) thereupon the afore omission, would constitute a gross investigative failure, and, this Court would become constrained, to reverse

the verdict of conviction, pronounced upon the accused. However, a careful reading of the deposition, occurring in the examination-in-chief of PW-1, makes candid underscroings, vis-a-vis, PW-1, making echoings qua upon his asking the names, of, the accused, theirs disclosing their names, as, Lame Chhame, and, others as Puran, Kalle, and, Rajesh. However, obviously only Hari Parshad @ Lame Chhame, and, Puran are arrayed, respectively, as co-accused No. 2, and, co-accused No. 3, in Sessions Trial No. 11 of 2016, (b) whereas, the other incriminatory participants in the relevant incident, in as much as, Kale, and, Rajesh are evidently juveniles, and, trial upon them was made by the Juvenile Justice Board concerned. Even the name of co-accused Panch Ram, does not figure, in the afore made examination-in-chief, by PW-1. However, even if assumingly, the afore made disclosure, as, occurring in the examination-in-chief, of PW-1, is, an improvement, and, or an embellishment, upon, his previously recorded statement, in writing, and, as embodied in Ext. PW-31/D-5, in as much as, his not naming the afore(s) therein(s), (c) and, also if PW-1, namely Pankaj, does not name co-accused No.1, as, the incriminatory participant, in the relevant incident, yet, all the exculpatory effects thereof rather become effaced (a) upon a reading of the cross-examination, as, made, upon, PW-1, disclosing, vis-a-vis, suggestion(s) carrying affirmative echoings, hence attributing incriminatory participation of the accused, in the relevant charged offences, becoming meted to him, in as much as, therein occurring, a, reference of the accused persons, arriving at the site of occurrence, on the day, whereat it occurred, (b) and, qua wherewith(s) a negative answer became hence meted, by PW-1, (c) per-se thereupon this Court becomes constrained, to draw an inevitable inference, and, as obviously ensues therefrom, in as much as, the learned defence counsel, rather solitarily therethrough acquiescing, to, the arrival of the accused, at the relevant site of occurrence, and, on the relevant date, besides time, and his also acquiescing, vis-a-vis, the incriminatory participation, of the accused, in the charged offence. Furthermore, therefrom an inference also becomes erectable, qua, the afore suggestion, carrying an entrenched tinge, of, familiarit(ies), of, PW-1, with the names, and, also with the identities of the accused, whereupon he became facilitated, to, without any preceding therewith, hence identification parade, being conducted by the Investigating Officer concerned, to, hence make their apt identification in court, (i) nor hence the afore purported identification, in Court, by PW-1, of the accused, acquires any purported taint, of, his embellishing, or, improving upon his previous statement recorded in writing. Moreover, infirmities, if any, in the afore made inferences, become completely cemented, through the defence counsel, while holding PW-1, to, cross-examination, his also meteing a suggestion, to him, rather suggestive of the participation of the accused, in the incriminatory occurrence, in as much as, his meteing a suggestion wherethrough, he strived to elicit, a, specific answer, vis-a-vis, the weapons of offence, hence,

wielded, at the relevant time, by each of the accused, (ii) suggestion whereof per-se mobilizes an inference, qua, the defence, therethrough acquiescing, vis-a-vis, the participation of the accused, in, the charged offences. Reiteratedly, thereupon the afore made submission before this Court, appertaining to lack, of, making of previous valid statements, before the Investigating Officer, by PW-1 and or by PW-9 and, therein, his/theirs making disclosures, vis-a-vis, the key physical attributes, of each of the accused, for, thereafter(s) theirs becoming facilitated, to, in a valid identification parade, hence identify them thereat, and, rather theirs identifying in court, each of the accused, hence rendering faulty, the, identification, of the accused only in court, rather does necessarily, and, obviously become(s) construable, to be an argument, hence warranting rejection, (iii) significantly, for the aforestated reasons. In sequitur, the, identification in Court, by the afore PWs, of all the accused, becomes enveloped, in an aura of evidentiary creditworthiness.

6. Be that as it may, apart from the afore made inferences, additional impetus thereto becomes bolstered, through PW-10, and, PW-11, both, of, whom, are, the uncontroverted employers, of, the accused, in their respective examinations-in-chief, making candid voicings qua theirs holdingknowledge, qua the participation of the accused, in the charged offence. Moreover, both the afore prosecution witnesses, in their respective examinations-in-chief, proceeded to identify the accused, to be the persons, vis-a-vis, whom they made the afore alluded bespeakings, in their respective examinations-in-chief. The afore made bespeakings, occurring in the examinations-in-chief of PW-10, and, PW-11, remained unattempted, to be refuted, vis-a-vis, their efficacy, even during, the course of the learned defence counsel, conducting cross-examinations, upon them. The effects of the afore omission(s), is, qua this Court being leaned to conclude, (i) vis-a-vis, the identification(s), of, the accused, through the afore unshattered testifications, of, PW-10, and, PW-11, cogently purveying succor, to the depositions of PW-1 and PW-9 hence obviously through theirs rendering corroboration(s) thereto, (ii) and, also thereupon, dehors, any test identification parade, being conducted by the Investigating Officer concerned, prior to all the afores, rather making the identification(s) in court, of the accused, rather their inter-se corroborative testification, vis-a-vis, the factum probandem, and, as emanates, from a conjoint reading, of, the testimony, rendered by PW-1, and, PW-9, and, also by PW-10, and, PW-11,hence emphatically clinching, the charges drawn against the accused. Moreover, therethroughs, most emphasisingly, the afore purported wants, of, holding(s) of the apposite test identification parade, by the Investigating Officer concerned, and also his wants, of, eliciting the participation(s) thereins, of, the accused, and, of PW-1 and PW-9, did not render, incapacitated either PW-1 or PW-9, to identify the accused, in, Court, (b) nor hence the afore wants render

nugatory, the credible ocular account made by PW-1 and PW-9, and, appertaining to the incriminatory participation, of, the accused, in the charged offence. Furthermore, the effect, of, the afore drawn inference, is qua, the, report of the FSL concerned, wherein no incriminatory echoings, are borne, vis-a-vis, the accused also being rendered nugatory.

7. The learned counsel appearing, for the appellants has also contended, with much vigor, before this Court, that since, readings of the echoings, occurring in the examination-in-chief, of, PW-1, and, of PW-9, (i) unfold qua theirs fleeing, from the spot, and, theirs hiding in the wheat fields, occurring in the vicinity of the site of occurrence, hence both PW-1, and, PW-9, became precluded, to sight, the happening at the relevant site, and, also their ocular account(s) rather not holding any credibility. However, the strength of the afore, becomes completely blunted, hence from the trite echoings, borne, in the cross-examination of PW-1, wherein suggestions appertaining, to the duration, of, the incriminatory incident, became meted to PW-1, and, obviously therefrom, an inference becomes erectable, vis-a-vis, the defence acquiescing, to, the sighting, of, the occurrence, by PW-1, and, PW-9. In aftermath, when as aforestated, they rather, render their respective depositions, without any taint, of, theirs improving or embellishing, upon theirs respectively recorded previous statements in writing, and, nor when they render narrations, vis-a-vis, the charged offence, with any iota, of, any inter-se contradictions, rather when there occur(s), the completest inter-se corroborations, inter-se, the testimony(ies), of, PW-1, and, of PW-9, (ii) thereupon their consistent ocular account(s), vis-a-vis, the charged offence, become amenable, for, fastening, of, credibility thereto.

8. The post mortem report, appertaining to deceased Rinku, is, comprised in Ext. PW-16/B, and, thereins, the ante-mortem injuries occurring thereons, hence find narration(s), injuries whereof are extracted hereinafter:-

> "1. There was clean cut margin incised wound on right side of chin, obliquely placed. It was 6 cm long with maximum breadth 2 cm and there was clotted blood present in and around the wound. Wound was bone deep, cutting the mandible.
>
> 2. Central incisor right side and lateral incisor left side of upper jaw were absent with injury to there sockets and was presence of bleeding from these sockets and their gums, whereas lateral incisor of right side and medial incisor of left side of upper jaw were loose due to dislocation with presence of bleeding. There was reddish coloured abrasion of inner surface of upper lip corresponding to all incisors of upper jaw in area of 4cm x 3 cm and upper lip was swollen.
>
> 3. There were patterned bruises in three directions,two parallel bruises on each three directions as soon in the diagram in the post mortem report was suggestive of either with stick or with rod. Each bruise was

in area of 13 cm x 1.5 cm. These said bruises were of reddish coloured and on back of chest in infra scapular regions.

4. There were reddish coloured patterned bruises on back of chest on left side lateral to D 5 – D 11, parallel to each other, each bruise was in area of 13cm x 1 cm.
5. There was reddish coloured bruise over right scapula in area of 8 cm x 3 cm.
6. There was reddish blue coloured contusion on lateral aspect of right arm in its proximal portion in area of 9 cm x 1.5 cm.
7. Medial to above said contusion mentioned in injury No. 6, there was reddish blue coloured contusion on said right arm in area of 2 cm x 1.5 cm.
8. Reddish coloured abrasion was present in middle 1/3 portion of right fore arm on back side in area of 2 cm x 0.5 cm.
9. There were sharp edged incised wounds, two in number in occipital area, one on right side was 4 cm x 2cm x bone deep, whereas the another one was in mid portion, medial to the above said wound, it was 2cm x 1 cm x bone deep. Blood fluid was coming out from these wounds. During dissection of scalp and skull, clotted was present over whole of skull and its mussels as well as on inner surface of scalp over both parietal regions, left temporal region up to ear. There was fracture of occipital bone, fracture was depressed comminuted in occipital region in area of 5cm x 4 cm. After opening the skull cap, there was extra dural haemorrhage, dura was torn in occipital region. There were subdural and sub arachnoid haemorrhages. Contusion of right cerebral hemisphere was present in its back portion in area of4.5 cm x 5.5 cm.
10. Left clavicle was fractured, there were fracture of rib 1st to 11th on left side of chest, left pleural cavity was having about one litter of blood fluid, lower lobe of left lung was ruptured. Right clavicle was fractured, there were fracture of ribs 1 to 4 on right side, right upper lobe of lung was ruptured. There was about 750 ml of blood fluid in right thoracic cavity. The intercostal muscles were grossly contused at the site of fracture ribs on both sides.
11. There was harp edged wound with clean cutmargins, over proximal portion of nose, it was 1.5 cm x 0.5 cm x bone deep with fracture nasal bone. Clotted blood was present in and around the wound.
12. There were multiple reddish coloured abrasion son right side of face in area of 8 cm x 5 cm. Underlying right maxilla was fractured.
13. There was reddish coloured abrasion on right side of fore head extending to right eyebrow in area of 3cm x 2 cm.
14. Reddish coloured abrasion in 2 cm x 1 cm area on left side of fore head above eyebrow was present.
15. Reddish blue coloured contusion was present on left side of fore head in area of 6 cm x 5 cm.

16. There were multiple reddish coloured abrasion on back of right hand over its proximal part in area of 8 cm x 1 cm.
17. Reddish coloured abrasion on back of right wrist and fore arm in area of 5 cm x 0.5 cm over reddish coloured contusion in area of 5 cm x 6 cm.
18. There was reddish coloured linear abrasion onmedial side of right arm in lower half portion of length1.5 cm over radish coloured contusion in area of 2 cm x 1.5 cm.
19. There was reddish coloured abrasion in upper 1/3 portion of right thigh on its lateral surface in area of1.5 cm x 1 cm.

9. The post mortem report appertaining to deceased Ashwani Kumar is comprised in Ext. PW-16/F, and, thereons the ante-mortem injuries occurring therein(s) hence find narrations, injuries whereof are extracted hereinafter:-

"1. There was bluish coloured contusion below right Ear in area of 9 cm x 8 cm.
2. Right eye was blackish blue and swollen and was a black eye. There was reddish coloured abrasion on right side of face in area of 6 cm x 3 cm.
3. There was bluish coloured contusion on lateral and posterior surface of right shoulder and right arm in area of 22 cm x 11 cm.
4. There was bluish coloured contusion on back of abdomen on right side extending to right gluteal region in area of 41 cm x 18 cm, extending from level of D 10.
5. There was reddish coloured abrasion over front to lateral surface of right iliac crest in area of 04 cm x 01cm.
6. Bluish red coloured contusion was present on back surface of right hand in area of 08 cm x 10 cm.
7. Reddish coloured abrasions were present on back of fingers (Index to little and thumb) of right hand over joints of proximal – middle phalanges joints.
8. During dissection of scalp and skull, there was clotted blood over whole of skull and over inner surface of scalp, after removing clotted blood, there was depressed, comminuted fracture in right temporo – parietal bones of skull in area of 08 cm x 05 cm extending as fissure fracture in left temporo parietal bone and left temporal bone upto left year, blood fluid was coming out from the site of fracture. Afterre moving skull cap, there was extra dural haemorrhage. Dura was torn at right temporo parietalarea, after opening dura, there was diffused sub-duraland sub archnoid haemorrhages. Cerebral hemisphereon right side was contused in area of 05 cm x 04 cm over outer surface with presence of small piece of bone in it. After removing the dura and brain, there was fissure fracture in right anterior cranial fossa."

10. PW-16, who conducted autopsy, upon, the bodies of the afore deceased, stepped into the witness box, and, during the course of his examination-in-chief, has proven, the, afore post mortem reports. Moreover during the course of his examination-in-chief, upon,

permission being granted, by the learned Trial Judge, the sealed cloth parcel(s) containing therewithin(s), the weapons of offence, became opened, and, after retrieving them, from, the sealed paracels, hence holding therewithin(s), the, recovered weapons of offence, each became shown to PW-16, (i) and, thereins, he loudly pronounces, vis-a-vis, injuries borne, in, Ext. PW-16/B, and, Ext. PW-16/F, rather, being causable through user thereon(s), of, the afore shown, to him, hence weapons of offence. The afore made pronouncement, occurring in the examination-in-chief of PW-16, acquires an aura of evidentiary solemnity, paramountly, when no efficacious cross-examination qua therewith, became conducted upon him, by the learned defence counsel, (ii) therefrom an apt corollary ensues, qua, hence there occurring inter-se compatibility, inter-se medical evidence, and, vis-a-vis, the afore alluded credible ocular account, appertaining to the incriminatory participation, of, the accused, in, the charged offence.

11. The recoveries of weapons of offence, where to which, became respectively assigned exhibit Marks, P-2, P-4, P-6, and, P-8, became effectuated, through Ext. PW-3/D. Moreover the recovery of 6 Darats, became effectuated, through memo comprised in Ext. PW-8/B. However, the afore made recovery(ies), through the afore drawn memos, remained uneffectuated through the statutorily ordained mechanism, as, becomes embodied, in Section 27 of the Indian Evidence Act, in as much as, despite the afore provisions rather casting, (a) a statutory injunction upon the Investigating Officer, to record a valid disclosure statement, of the accused, prior to the recovery, of, weapons' of offence, being effectuated, (b) besides the afore drawn disclosure statement(s) , containing the signatures, of, the accused, (c) whereafter, the recoursings, by the Investigating Officer concerned, to effectuate recovery(ies) of weapons' of offence, through recovery memos, hence may become construable to be a valid recoursing(s), whereas, rather the Investigating Officer breaching the afore mandate, thereupon, prima facie, no validity is assignable to the afore made recovery(ies). However, thereupon this Court would not come, to negate the afore drawn conclusion, nor would negate the conspicuous loud credible echoings, made respectively by PW-1, and, PW-9, underlining therein the incriminatory participation of the accused in the charged offence, and, whereto become(s), meted, the, completest corroboration(s), by PWs-10, and, PW-11, and, besides when completest inter-se synchronizations, upsurge inter-se, medical evidence, and, ocular account(s).

12. Conspicuously and reiteratedly, the recoveries of weapons of offence, became effectuated through memo Ext. PW-3/D, and, through memo Ext. PW-8/B, and, since the marginal witnesses thereto, in their respective examinations-in-chief, efficaciously prove all the recitals, as borne, in the afore memos, thereupon validity is to be assigned to the drawings of the afore memos. Moreover, both the afore, during the course of their respective examinations-

in-chief, became shown the weapons of offence, enclosed within the cloth parcels, after theirs becoming retrieved therefrom, and, whereupon(s), they disclosed them to be the ones, as became recovered, through, the afore memos, comprised in Ext. PW-3/D, and, in Ext. PW-8/B. However, during the course of the learned defence counsel, conducting cross-examinations, upon them, he rather omitted to mete any suggestions to them, hence containing echoings, vis-a-vis, falsity of drawings of the afore memos Ext. PW-3/D, and, Ext. PW-8/B. Consequently, the afore echoings occurring in, the, examinations-in-chief of PW-3, and, PW-8, and, appertaining to validity of drawings of Ext. PW-3/D, and, Ext. PW-8/B, acquire an aura of completest evidentiary solemnity, and, also cast a further effect qua the defence acquiescing, vis-a-vis, their user, at the relevant time, by the accused, in the charged offence(s). Moreover, the learned defence counsel, while holding the afore to cross-examination, omitted to also mete any suggestion, to each of them, hence personificatory, vis-a-vis, the place, of, the apposite recovery(ies), rather not being the apposite place(s), hence occupied by any of the accused. Conspicuously, the effect of the afore omission, is, rather it garnering an inference, qua hence the place(s) wherefrom, the weapons of offence, as, became recovered, through drawing(s), of, memos, respectively borne in Ext. PW-3/D, and, in Ext. PW-8/B, being construable, to be in possession, and, occupation, of the accused, (i) and, also concomitantly therefrom inferences, hence become sparked, vis-a-vis, the recovery(ies) made through the afore memos, being validly proven, on, all facets. Moreover, therefrom a further apt sequel becomes bolstered qua within the afore place(s), the accused hiding, or, camouflaging the weapons of offence(s), reiteratedly for wants of the afores, becoming cross-examined, hence appertaining to the afore factum. Consequently, infirmities, if any, as purportedly spur for, from, the afore memos, not being drawn, in consonance with the mandate, borne in Section 27 of the Evidence Act, rather therethroughs becoming subsumed, and, underwhelmed.

14. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence, on record, in a wholesome and harmonious manner, apart therefrom, the analysis of the material, on record, by the learned trial Court, does not, suffer from any gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record. Consequently, there is no merit in the instant appeal, hence, it is dismissed, and, the impugned verdict, is, affirmed, and, maintained. Records be sent back forthwith.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR. JUDGE AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, JUDGE

1. **Cr. Appeal No. 577 of 2019**

Bali Ram ...Appellant

versus

State of H.P. ....Respondent.

2. **Cr. Appeal No. 588 of 2019**

Tharwan Lal ...Appellant

versus

State of H.P. ....Respondent.

Cr. Appeal Nos. 577 & 588 of 2019
Reserved on : 5.11.2020
Date of decision 10th November, 2020

Narcotic Drugs and Psychotropic Substances Act - Section 20- Both the accused persons were found in exclusive and conscious possession of 2 kgs. 520 gms of contraband being carried in a bag while travelling in a bus – Trial Court convicted both of them – Two appeals preferred – It was held that contraband was not recovered from personal search hence I.O was not required to seek the consent prior to search – Case property remained untampered – Both the independent witnesses supported the case – Conviction was found without perversity- Appeal dismissed.

For the appellants: Ms. Kiran Dhiman, Advocate, for the appellant in Cr. Appeal No. 577 of 2019 and Ms. Shradha Karol, Advocate, for the appellant in Cr. Appeal No. 588 of 2019.

For the respondent: Mr. Hemant Vaid, Addl. A.G.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge:

Since, both Cr. Appeal No. 577 of 2019, and, Cr. Appeal No. 588 of 2019, are, directed against a common verdict, hence, rendered on 23.7.2019, upon, Session Trial No. 10 of 2016, by the learned Special Judge (1) Mandi, District Mandi, H.P., wherethrough, vis-a-vis, a charge(s) drawn under Section 20, of, the Narcotic Drugs, and, Psychotropic Substances Act, 1985, against, (one Bali Ram, and, against one Tharwan Lal), both through the afore common verdict, become convicted, thereupon both the afore appeals, are amenable, for, a common verdict becoming rendered thereon.

2. In pursuance to both the afore accused becoming convicted, for, the afore drawn charges, they became hence sentenced, to, undergo rigorous imprisonment, extending

upto 10 years, and, also both became imposed, a, fine of Rs. 1,00,000/- each, and, in default(s) of payment of fine, both the convicts, were directed, to, further undergo simple imprisonment extendable upto a period of one year each. The period of detention undergone by both, during investigation(s), and, trial of case, was ordered to be set off, from, the afore imposed sentences, of imprisonment upon both, the afore accused, also obviously, upon, theirs becoming aggrieved, from the afore imposed sentences, upon them, hence they cast challenge thereon(s), through theirs instituting the afore appeals, before this Court.

3. The police party, during the course of theirs performing the duty of checking traffic, on 4.12.2015, at place Nagchala, National Highway-21, hence in front of Panchayat Ghar, ingressed into bus, bearing registration No. PB-12-Q-9965, for, carrying inspections thereof. The passengers, as, borne thereon, were, for facilitating the checking(s), of, the afore bus, hence, asked to keep their luggage with them. However, during course thereof, PW-12, noticed that one rucksack bag, of, red, and, gray colour, hence occurring above seat Nos. 37 and 38, rather remaining un-picked, by any of the passengers, sitting inside the bus. He also noticed that, on seat No. 37, and, on seat No. 38, one Bali Ram, and, one Tharwan Lal, hence sitting, under the rack, and, on seeing the police, theirs becoming perplexed, hence arousing suspicion, of, the police party, (a) whereupon they were asked, about theirs holding knowledge, vis-a-vis, their respective inter-se identities, and, upon theirs feigning knowledge, vis-a-vis, their respective identities, hence constraining the Conductor of the bus, namely Harpreet Singh, PW-7, to, disclose to the police officials, qua, theirs traveling, under, a common ticket. Consequently, the afore factum aroused further suspicion, of the police, and, both the accused, were asked to alight the bus, and, were taken to near Panchayat Bhawan, hence occurring in the vicinity, of, the site of occurrence, and upon search being made, of, bag Ext. P-7, by the Investigating Officer, the latter through memo borne in Ext. PW-7/B, hence therethrough, effectuated recovery of, the, therewithin carried charas, weighing 2 kg, 520g. Both the accused appended their signatures upon Ext. PW-7/B, and, also thereon(s), the two associated thereto independent witnesses, appended their respective signatures. Since the recovery of contraband, borne in Ext. P-8, was, not effectuated, from any personal search(s), of any accused, being made by the Investigating Officer concerned, and, rather when the recovery of contraband, borne in Ext. P-8, became effectuated, in the afore alluded manner, thereupon no mandatory statutory obligation became cast hence upon, the Investigating Officer concerned to, prior thereto, seek the consent, of, the accused, for their personal search(s), being made by him. Moreover through Ext. PW-7/B, Ext. P-3 Adhar Card, and, Ext. P-4, Voter Card, respectively appertaining to accused No.1, and, to accused No. 2, became effectuated, from the afore red colour bag, as, borne in Ext. PW-7/B. Also a reading of Ext. PW-7/B discloses, vis-a-vis,

subsequent to the recovery therefrom, of, contraband, hence weighing 2.520g, becoming effectuated, the afore recovered contraband becaming re-packed, in the same cloth bag, and, thereafter it became put into the same rucksack bag, and, became sealed in a separate cloth parcel, whereons 14 seal impressions, each carrying thereins, english alphabet 'V', became embossed. PW-12, at the site of seizure, also filled up NCB form, borne in Ext. PW-1/E, whereins occur reflections hence carrying graphic analogity with the afore reflections, as cast in Ext. PW-7/B. Further, through Ext. PW-7/B, the recovery, of, the Identity Card, and, of, the Aadhar Card, of, both accused, and, borne respectively, in, Ext. P-3, and, Ext. P-4, became effectuated, and, hence constrained the Investigating Officer, to, insert, both, in, a cloth parcel, and, thereons 6 seal impressions, each carrying english alphabet 'V', became embossed. Consonant therewith, formal FIR, as became registered with the police station concerned, is, comprised in Ext. PW-1/B.

4. The case property became transmitted to the SHO of the police station concerned, and, the latter, after verifying the afore seals, as, carried upon the apposite cloth parcel, re-sealed, the parcel carrying therewithin, the seized contraband, hence with 6 re-seal seal impressions, each carrying thereon(s) english alphabet 'S'. The afore observations, become borne in, the, re-sealing certificate, comprised in Ext. PW-1/F. Subsequent to the drawing of Ext. PW-1/F, the SHO concerned, deposited the seized case property, before the in-charge of the Malkhana concerned. A reading of the abstract, of the Malkhana, as, becomes enclosed in Ext. PW-4/F, makes display, vis-a-vis, there occurring inter-se compatibility, inter-se, the initially made seal impressions, at the site of occurrence, upon, the apposite cloth parcel, and, also, the vis-a-vis, the re-seal, seal impressions, as, made thereons, by the SHO concerned, hence both in respect of numbers thereof, and, also in respect of, the, english alphabets, hence scribed on each of them.

5. Through road certificate, borne in Ext. PW-9/B, the case property, stood transmitted, to the FSL concerned, and, upon, the contents, of, the afore apposite cloth parcels, becoming examined thereat, by the Chemical Examiner hence working thereat, (i) conspicuously, as apparent, on a reading of Ex. PA, he made, an opinion, vis-a-vis, the charas, as became enclosed, in the cloth parcel concerned, after becoming retrieved therefrom, for, its analysis, hence holding the apposite substance/resin, whereupon the seized contraband, became declared, as Charas. Apart from the above, for, the purpose of determining, the, potency, of, existence(s), of, the afore alluded synchronization(s), and, compatibilities, vis-a-vis, the afore prima donna factum probandum, the, extraction of paragraph No. 7 of Ex. PA, is, imperative, paragraph whereof, reads, as under:-

> "7. Description of parcel: One sealed cloth parcel bearing fourteen seals of "V" and six seals of "S". The seals were found intact and tallied with

> specimen seals sent by the forwarding authority and seals impressions impressed on the forms NCB-1. The parcel was kept in safe custody of the Assistant Chemical Examiner till the report of the same was signed & dispatched."

A perusal thereof, underscores, vis-a-vis, upon, receipt of the apposite cloth parcel, at the laboratory concerned, its hence carrying thereon(s) completest analogus descriptions, appertaining, to the number(s) of seal impressions, and also, to, re-seal, seal impressions, and, also, vis-a-vis, the, respectively made English Alaphabet(s) thereons, and, besides all afores rather bearing synchronization(s), vis-a-vis, the description(s) as made qua therewith, in Ext. PW-9/B, and, in the apposite NCB form, borne in Ext. PW-1/E. Furthermore, the effect(s), of, existence(s), of, the afore congruities, and, compatibilities, and, as become unfolded, through a reading, of, paragraph No.7, of, Ex. PA, is, qua an unflinching conclusion, becoming aroused, vis-a-vis, the case property, travelling from the Malkhana, of the Police Station concerned, upto, the FSL concerned, in an untampered condition. Moreover, a perusal of Ext. PA, underscores, vis-a-vis, the chemical analyst concerned, after re-enclosing, in the cloth parcel(s), the relevant contraband(s), after his making analysis thereof, his embossing thereons, seals of the FSL concerned, and, his returning them, to the Malkahana, hence, existing at the police station concerned. It was from the Malkhana, of, the police station concerned, that the case property(ies), became produced, before the learned trial court concerned.

6. Be that as it may, even at the stage contemporaneous, to the production, of, the case property, in court, thereat also, it enjoined, qua its carrying, all the afore alluded apposite analogities, and, similarities, and, in case, in contemporaneity, vis-a-vis, the production, of, the case property, before the learned trial court, the afore analogities, and, similarities, remained cogently proven, to, be intact, thereupon, this Court, would become coaxed, to conclude, that the prosecution, has been able to prove the guilt of the accused, beyond all reasonable doubts.

7. For fathoming, the afore factum, a reading of the court observations, as, made by the learned trial Court, during, the course, of, the recording, of, examination-in-chief of PW-7, is imperative, and, Court observations whereof, are, extracted hereinafter:-

> "At this stage, the Ld. P.P., produced two sealed parcels, one sealed with seal 'V' at 6 places and another sealed with seal 'V' at 14 places, seal S at six places and 4 seals of F.S.L. The seals are found intact. The Ld. P.P. prayed to open the parcel, which is considered and allowed. On opening the parcel Ex. P1 which is signed by me as a witness, it was found containing a polythene wrapper Ex. P2 and Adhhar card Ex. P3 and voter card Ex. P4, which are the same as recovered from the accused on the spot and were taken into possession in the parcel Ex. P1 vide recovery memo Ex. PW7/B.
>
> On opening the second parcel Ex P5, which is also signed by me as a witness, the Ld. P.P., prayed to open the parcel, which is considered and allowed. On opening the parcel Ex. P5, Pithu bag Ex. P6 came out. On opening the Pithu bag, a read colour carry bag Ex P7 without knot was taken out, it was

found containing charas/Bhang Ex P8 along with Polythene wrappers Ex. P9, which are the same as recovered form the accused persons on the spot."

A reading whereof, makes palpable disclosure(s), vis-a-vis, the initially made seals impressions, on the cloth parcel, hence appertaining, to, number(s) thereof, and, also appertaining, to, English Alphabets, made thereon(s), (a) and, besides makes graphic underscorings qua re-seal, seal impressions, made thereon(s), by the SHO concerned, both in respect of numbers thereof, and, also in respect of English Alphabet(s), as, made thereon(s), (b) and, in addition, the, re-seal, seal impressions, of the FSL concerned, as made thereon, rather with the completest inter-se comonalit(ies) hence becoming found existing thereon(s), (c) and, also all the seals, being found, to, be untampered, and, intact. The afore made court observations, remained uncontested, by the learned defence counsel, inasmuch, he did not object, to, the veracity of the afore made court observations. Consequently, the learned counsel, appearing for the appellant, cannot contend, that either all the afore apposite analogities and compatibilities, not existing in contemporaneity, vis-a-vis, the production, of, the case property in court, (c) and, nor also can contend, vis-a-vis, the apposite seal impressions or re-seal, seal impressions, being tampered, (d) especially when the learned trial court has made observations, vis-a-vis, theirs being untampered, and, intact. The sequel thereof, is, vis-a-vis, the imperative link, as, commencing, from the recovery of the contraband, as, made, from the exclusive, and, conscious possession, of, the accused, at the site of occurrence, hence through seizure memo borne in Ext. PW-7/B, remaining alive, and, subsisting even during the course, of, production, of, the case property in court, thereupon, the charge becoming invincibly proven against the accused. Conspicuously, also when unchallenged signatures of the accused exist on the afore exhibits.

8. Since both the independent witnesses, as, become associated, in the relevant proceedings, at the site of occurrence, completely supported the prosecution case, thereupon the charge against the accused, hence becomes cogently proven. Moreover, the afores also do not dispute the existence(s), of, their respective signatures, on the sealed cloth parcels, besides when a perusal of the recovery memo, borne in Ext. PW-7/B, makes vivid echoings, qua, Aadhar Card Ext. P-3, and, Voter Card, Ext. P-4, rather respectively appertaining to the identities of the accused, also becoming recovered, from bag Ext. P-7, rather wherefrom the incriminatory contraband, Ext. PW-8, also became recovered, (i) thereupon bag Ext. P-7, wherefrom the recovery of contraband became effectuated, is to be construed, to be in the exclusive ownership, and, possession of both, the accused, and also, concomitantly both the accused are to be concluded to hold conscious, and, exclusive possession, also of charas, as became enclosed therewithins.

9. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence, on record, in a wholesome and

harmonious manner, and, the analysis thereof, by the learned trial Court, hence does not suffer, from, any perversity or absurdity of mis-appreciation and non-appreciation, of evidence, on record.

10. Consequently, there is no merit in the extant appeals, and, the same are dismissed accordingly. The judgment impugned before this Court is maintained and affirmed. All pending applications also stand disposed of. The records be sent down forthwith.

BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR. JUDGE

Shikhil Katoch ....Petitioner

Versus

State of Himachal Pradesh ....Respondent.

CRMMO No. 265 of 2019
Reserved on : October 7, 2020
Date of Decision: November 23, 2020

Narcotic Drugs and Psychotropic Substances Act –Sections 21 & 29 – Code of Criminal Procedure- Section 173, 468 & 473- An FIR was registered against the petitioner and other accused for the commission of offences punishable u/s 21 & 29 of NDPS Act – Trial court took cognizance and such order was challenged on the ground of limitation – It was held that state has explained the delay satisfactorily caused in launch of prosecution – Order not interfered keeping in view the object and purpose of NDPS Act – Complete record was not produced before the trial court- Directions issued to Director General of Police to take appropriate action against concerned authority/ police officers for submitting cancellation report, falling to explain cause of delay and giving illogical explanation- Petition disposed of.

Cases referred:

Assistant Collector of Customs Bombay & another v. L.R. Melwani & Another, AIR 1970 SC 962;
Surinder Mohan Vikal V. Ascharaj Lal Chopra, (1978) 2 SCC 403);
State of Punjab v. Sarwan Singh, (1981) 3 SCC 34;
Srinivas Pal v. Union Territory of Arunachal Pradesh (Now State), AIR 1988 SC 1729;
Zandu Pharmaceutical Works Ltd. and others v. Mohd. Sharaful Haque and another, (2005) 1 SCC 122;
Japani Sahoo v. Chandra Sekhar Mohanty, (2007) 7 SCC 394;
Sarah Mathew v. Institute of Cardio Vascular Diseases by its Director Dr. K.M. Cherian & others, reported in (2014) 2 SCC 62;
Bharat Damodar Kale & another v. State of A.P., (2003) 8 SCC 559;
Sahoo's case (2007) 7 SCC 394;
Vanka Radhamanohari (Smt.) v. Vanka Venkata Reddy & others, (1993) 3 SCC 4;
Sukhdev Raj v. State of Punjab, 1994 Supp (2) SCC 398;
Arun Vyas & another v. Anita Vyas, (1999) 4 SCC 690;

H.P. v. Tara Dutt & another, (2000)1 SCC 230;
Rakesh Kumar Jain v. State through CBI, New Delhi, (2000) 7 SCC 656;
Ramesh and others v. State of T.N., (2005) 3 SCC 507;
Udai Shankar Awasthi v. State of Uttar Pradesh & another, (2013) 2 SCC 435;
Japani Sahoo supra; Sajjan Kumar v. Central Bureau of Investigation, (2010) 9 SCC 368;
NOIDA Entrepreneurs Association v. NOIDA & others, (2011) 6 SCC 508;
State of Maharashtra v. Sharadchandra Vinayak Dongre & others, (1995) 1 SCC 42;
P.P. Unnikrishnan & another v. Puttiyottil Alikutty & another, (2000) 8 SCC 131;
Subodh S. Salaskar v. Jayprakash M. Shah & another, (2008) 13 SCC 689;

For the Petitioner : Mr. N.S. Chandel, Senior Advocate, with Mr. Vinod Kumar Gupta, Advocate.

For the respondent : Mr. Desh Raj Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Petitioner, alongwith two others, is an accused in Criminal Case bearing registration No.14 of 2018, titled as *State v. Prashant Prabhakar*, plending before Judicial Magistrate 1st Class, Court No.II, Una, in case FIR No.304/2016, dated 16.11.2016, registered in Police Station Una, District Una, Himachal Pradesh, under Sections 21 & 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (herein after referred to as 'NDPS Act').

2. Present petition has been preferred against impugned order dated 4.6.2018, passed by Judicial Magistrate, whereby the learned Magistrate has taken cognizance for commission of offence referred supra. Challenge to impugned order has been laid on the ground that the prosecution launched against the petitioner and other accused is time barred.

3. According to the prosecution case, accused persons were apprehended, on 16.11.2016, for having conscious and exclusive possession of 2.80g + 1.80g = 4.60g heroin and FIR was also registered on the same day.

4. It is submitted on behalf of the petitioner that and for alleged commission of offence, as provided under Section 21(a) NDPS Act, maximum sentence is one year imprisonment or with fine, which may extend to ten thousand rupees, or with both. Referring Section 468(2)(b) of Code of Criminal Procedure (herein after referred to as 'Cr.P.C.'), it is contended that for an offence punishable with imprisonment for a term not exceeding one year, the period of limitation for taking cognizance is one year and as such in present case, the said period has elapsed on 15.11.2017, whereas challan/final report, under Section 173 Cr.P.C., has been presented in the Court on 24.5.2018 and the Court has taken cognizance of the alleged offence on 4.6.2018 erroneously.

5. In the aforesaid circumstances, it is contended that proceedings of the criminal trial pending before the trial Court are liable to be quashed and, thus, present petition.

6. In response to the petition, it is case of respondent-State that final report, under Section 173 Cr.P.C., in present case, was presented in Court on 24.5.2018 by SHO, Police Station Una, after 18 months, for the reason that investigation in this case was carried out by the then Incharge, Special Investigation Unit, Sub Inspector Ankush Dogra, who vide order dated 15.9.2017, prior to lapse of one year limitation period, was transferred from District Una to District Kinnaur and in compliance thereof was relieved on 26.9.2017, and at that time he did not hand over the charge of case file of this case and, therefore, the SHO, Police Station Una, had sent various wireless messages and emails, dated 21.11.2017, 28.11.2017, 17.2.2018 and 12.3.2018, directing the said Sub Inspector Ankush Dogra to hand over the pending case files, but the said Officer did not respond, whereupon FIR No.147/2018, dated 22.3.2018, was registered under Section 406 of the Indian Penal Code in Police Station Una, District Una, Himachal Pradesh against said Ankush Dogra. Copies of Transfer Order dated 15.9.2017 and FIR have also been placed on record with the reply.

7. It is further case of respondent-State that during the course of investigation of the aforesaid FIR No.147 of 2018 conducted by Sub Divisional Police Officer (SDPO), Haroli, Sub Inspector Ankush Dogra had joined investigation on 9.4.2018 and during that he had disclosed that after his relieving from District Una, his health was not good and he was not in District Kinnaur as he had proceeded for attending course with effect from 8th December to 24th December, 2017 in CBI Academy, Ghaziabad and further that with effect from 27.1.2018 to 24.7.2018 he was on medical rest and on earned leave due to health problem. It is claim of respondent-State that during investigation, on 9.4.2018, the said Ankush Dogra had handed over five case files, pertaining to case FIRs No.202/2016, 304/2016, 16/2017 of Police Station Sadar, Una, and 222/2017 and 272/2017 of Police Station Haroli, District Una to SDPO, Haroli, District Una, who transferred these files to concerned Police Stations and thereafter case file of present case (FIR No.304/2016 of Police Station Una) was handed over to another Investigating Officer and without wasting any further time final report in the present case was presented in the Court on 24.5.2018. Therefore, it is contended that there is justifiable and valid explanation for delay and, thus, petition deserves to be dismissed.

8. Learned Arguing Counsel for the petitioner and learned Additional Advocate General have relied upon pronouncements of the Apex Court in ***Assistant Collector of Customs Bombay & another v. L.R. Melwani & Another,*** **AIR 1970 SC 962;** ***Surinder Mohan Vikal V. Ascharaj Lal Chopra,*** **(1978) 2 SCC 403);** ***State of Punjab v. Sarwan Singh,*** **(1981) 3 SCC 34;** ***Srinivas Pal v. Union Territory of Arunachal Pradesh (Now***

State),* AIR 1988 SC 1729; *Zandu Pharmaceutical Works Ltd. and others v. Mohd. Sharaful Haque and another*, (2005) 1 SCC 122; *Japani Sahoo v. Chandra Sekhar Mohanty*, (2007) 7 SCC 394*; and ***Sarah Mathew v. Institute of Cardio Vascular Diseases by its Director Dr. K.M. Cherian & others*, reported in (2014) 2 SCC 62,** to substantiate their respective contentions.

9. Provisions of Section 468 Cr.P.C. and 473 Cr.P.C. read as under:

> **"468. Bar to taking cognizance after lapse of the period of limitation**:-
> (1) Except as otherwise provided elsewhere in this Code, no Court, shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.
>
> (2) The period of limitation shall be-
>
> (a) six months, if the offence is punishable with fine only;
>
> (b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;
>
> (c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.
>
> (3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.**"**
>
> **"473. Extension of period of limitation in certain cases**:-
>
> Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may take cognizance of an offence after the expiry of the period of limitations, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice.**"**

10. In present case, petitioner has assailed impugned order dated 4.6.2018, on which date learned Magistrate has taken cognizance. In the arguments canvassed on behalf of the petitioner, relevant date, for calculating expiry of the limitation period, has been taken the date of taking of cognizance by the Magistrate, whereas prosecution in present case has been instituted by submitting final report under Section 173 Cr.P.C. on 24.5.2018. Though filing of final report on 24.5.2018 is also beyond the prescribed period of one year, under Section 468(2)(b) Cr.P.C., but for avoiding any confusion, it is necessary to clarify which of the date

would be relevant for computing the period of limitation under Section 468 Cr.P.C. Would it be filing of complaint/date of institution of prosecution?

11. This issue is no longer res-integra, being settled by the five-Judges Bench of Supreme Court in pronouncement in case ***Sarah Mathew's*** case **[(2014) 2 SCC 62]**, wherein, after considering its previous pronouncements, it has been held that the judgment in ***Bharat Damodar Kale & another v. State of A.P.,*** **(2003) 8 SCC 559**, followed in ***Japani Sahoo's*** case **(2007) 7 SCC 394**, lays down the correct law for the purpose of computing the period of limitation under Section 468 Cr.P.C. and endorsing observations made in ***Vanka Radhamanohari (Smt.) v. Vanka Venkata Reddy & others,*** **(1993) 3 SCC 4,** and examining it in the light of legislative intent and meaning ascribed to the term "cognizance" by the Apex Court, it is made clear that Section 473 Cr.P.C. postulates condonation of delay caused by the complainant in filing the complaint and it is the date of filing of complaint which is material for calculating the limitation period. Thus, relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance.

12. Prior to insertion of Chapter XXXVI in Cr.P.C., by way of amendment in 1973, a Five-Judges Bench of the Apex Court in ***L.R. Melwani's*** case **[AIR 1970 SC 962]** has held that the question of delay in filing a complaint may be a circumstance to be taken into consideration for arriving at the final verdict, but by itself it affords no ground for dismissing the complaint/prosecution. However now, as also clarified in ***Sarah Mathew's*** case **[(2014) 2 SCC 62]**, the Court is empowered to dismiss the complaint or prosecution by refusing to entertain it or by refusing to take cognizance, in case filing/institution of complaint/prosecution is not permissible under Chapter XXXVI of Cr.P.C.

13. After inclusion of Chapter XXXVI in Cr.P.C., dealing with limitation for taking cognizance of certain offences, the Supreme Court, in ***Ascharaj Lal Chopra's*** case **[(1978) 2 SCC 403]**, has stated that statutes of limitation have legislative policy behind them, for instance, they shut out belated and dormant claims in order to save the accused from unnecessary harassment and they also save the accused from risk of having to face trial at a time when his evidence might have been lost because of the delay on the part of the prosecutor.

14. The Supreme Court in ***Sarwan Singh's*** case **[(1981) 3 SCC 34]** has stated the object of putting a bar of limitation in the Cr.P.C. on prosecution, observing that it is to prevent the parties from filing cases after a long time, as a result of which material evidence may disappear, and also to prevent abuse of process of the Court by filing vexatious and delayed prosecution long after the date of offence and this object is clearly in consonance with the concept of fairness of trial as enshrined in Article 21 of the Constitution of India and, therefore, it is of utmost importance that any prosecution, whether by the State or a private complainant,

must abide by the letter of law or take the risk of the prosecution failing on the ground of limitation.

15. The Apex Court in ***Vanka Radhamanohari's,*** **[(1993) 3 SCC 4]** case, has explained insertion of Chapter XXXVI in Cr.P.C. and differentiated the provisions of Section 5 of the Limitation Act and that of Section 473 Cr.P.C., and has observed as under:

> **"**5. Earlier there was no period of limitation for launching a prosecution against the accused. But delay in initiating the action for prosecution was always considered to be a relevant factor while judging the truth of the prosecution story. But, then a court could not throw out a complaint or a police report solely on the ground of delay. The Code introduced a separate chapter prescribing limitations for taking cognizance of certain offences. It was felt that as time passes the testimony of witnesses becomes weaker and weaker because of lapse of memory and the deterrent effect of punishment is impaired, if prosecution was not launched and punishment was not inflicted before the offence had been wiped off from the memory of persons concerned. With the aforesaid object in view Section 468 of the Code prescribed six months, one year and three years limitation respectively for offences punishable with fine, punishable with imprisonment for a term not exceeding one year and punishable with imprisonment for a term exceeding one year but not exceeding three years. The framers of the Code were quite conscious of the fact that in respect of criminal offences, provisions regarding limitation cannot be prescribed on a par with the provisions in respect of civil disputes. So far cause of action accruing in connection with civil dispute is concerned, under Section 3 of the Limitation Act, it has been specifically said that subject to the provisions contained in S. 4 to 24, every suit instituted, appeal preferred and an application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence. Section 5 of that Act enables any court to entertain any appeal or application after the prescribed period, if the appellant or the applicant satisfies the court that he had "sufficient cause for not preferring the appeal or making the application within such period". So far Section 473 of the Code is concerned, the scope of that section is different.
>
> .....
>
> In view of Section 473 a court can take cognizance of an offence not only when it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained, but even in absence of proper explanation if the court is satisfied that it is necessary so to do in the interests of justice. The said Section 473 has a non-obstante clause which means that said section has an overriding effect on Section 468, if the court is satisfied on the facts and in the circumstances of a particular case, that either the delay has been properly explained or that it is necessary to do so in the interests of justice.

> 6. At times it has come to our notice that many courts are treating the provisions of Section 468 and Section 473 of the Code as provisions parallel to the periods of limitation provided in the Limitation Act and the requirement of satisfying the court that there was sufficient cause for condonation of delay under Section 5 of that Act. There is a basic difference between Section 5 of the Limitation Act and Section 473 of the Code. For exercise of power under Section 5 of the Limitation Act, the onus is on the appellant or the applicant to satisfy the court that there was sufficient cause for condonation of the delay, whereas Section 473 enjoins a duty on the court to examine not only whether such delay has been explained but as to whether it is the requirement of the justice to condone or ignore such delay. As such, whenever the bar of Section 468 is applicable, the court has to apply its mind on the question, whether it is necessary to condone such delay in the interests of justice. While examining the question as to whether it is necessary to condone the delay in the interest of justice, the court has to take note of the nature of offence, the class to which the victim belongs, including the background of the victim. ....."

16. In ***Sukhdev Raj v. State of Punjab*, 1994 Supp (2) SCC 39**8, an application was filed by the prosecution for condonation of delay in instituting prosecution, with explanation for delay, at a later stage, almost at the time of conclusion of trial, but before judgment was delivered. The Apex Court has held that in facts and the circumstances of the case, if the delay has been properly explained or it is necessary to do so in the interest of justice, the Court can take cognizance, with further observation that Section 473 Cr.P.C. does not, in any clear terms, lay down that the application should be filed at the time of filing the challan itself and further that the words "so to do in the interest of justice" are wide enough.

17. Dealing with the object of Chapter XXXVI of the Cr.P.C. and Section 473 contained therein, the Apex Court in ***Arun Vyas & another v. Anita Vyas*, (1999) 4 SCC 690**, has observed as under:

> "10. It may be noted here that the object of having Chapter XXXVI in Cr.P.C. is to protect persons from prosecution based on stale grievances and complaints which may turn out to be vexatious. The reason for engrafting rule of limitation is that due to long lapse of time necessary evidence will be lost and persons prosecuted will be placed in a defenceless position. It will cause great mental anguish and hardship to them and may even result in miscarriage of justice. At the same time it is necessary to ensure that due to delays on the part of the investigating and prosecuting agencies and the application of rules of limitation the criminal justice system is not rendered toothless and ineffective and perpetrators of crime are not placed in advantageous position. The Parliament obviously taking note of various aspects, classified offences into two categories, having regard to the gravity of offences, on the basis of the punishment prescribed for them. Grave offences for which punishment prescribed is imprisonment for a term exceeding three years are not brought within the ambit of Chapter XXXVI. The period of limitation is prescribed only

> for offences for which punishment specified is imprisonment for a term not exceeding three years and even in such cases wide discretion is given to the Court in the matter of taking cognizance of an offence after the expiry of the period of limitation. Section 473 provides that if any Court is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice, it may take cognizance of an offence after the expiry of the period of limitation. This section opens with a non obstante clause and gives overriding effect to it over all the other provisions of Chapter XXXVI.**"**
>
> **.....**
>
> **"**14. It may be noted here that section 473 Cr.P.C. which extends the period of limitation is in two parts. The first part contains non obstante clause and gives overriding effect to that section over sections 468 to 472. The second part has two limbs. The first limb confers power on every competent Court to take cognizance of an offence after the period of limitation if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and the second limb empowers such a Court to take cognizance of an offence if it is satisfied on the facts and in the circumstances of the case that it is necessary so to do in the interests of justice. It is true that the expression in the interest of justice in section 473 cannot be interpreted to mean in the interest of prosecution. What the Court has to see is 'interest of justice'. The interest of justice demands that the Court should protect the oppressed and punish the oppressor/offender. .....**"**

18. A three-Judges Bench of the Apex Court in *State of* ***H.P. v. Tara Dutt & another,*** **(2000)1 SCC 230**, has held that Section 473 Cr.P.C. confers power on the Court taking cognizance after the expiry of the period of limitation, if conditions envisaged therein are fulfilled, i.e. where a proper and satisfactory explanation of delay is available and where the Court taking cognizance finds that it would be in the interest of justice, and this discretion conferred upon the Court, has to be exercised judicially and on well- recognized principles and wherever the Court exercises this discretion, the same must be by a speaking order, indicating the satisfaction of the Court with respect to satisfactory explanation and interest of justice. It is further observed that in absence of a positive order to that effect, it may not be permissible for the superior Court to come to the conclusion that the Court must be deemed to have taken cognizance by condoning the delay whenever the cognizance was barred and yet the Court took cognizance and proceeded with the trial of the offence and the matter of taking cognizance of an offence affecting the society, the Magistrate must liberally construe the question of limitation but the circumstances of the case requiring delay to be condoned must be manifest in the order

of Magistrate itself. Discretion exercised by the Magistrate on relevant consideration, cannot be faulted with.

19. In ***Rakesh Kumar Jain v. State through CBI, New Delhi,*** **(2000) 7 SCC 656**, the Magistrate had taken cognizance in the complaint filed after expiry of the period of limitation and had rejected the application of the accused filed under Section 245 Cr.P.C. for discharging him on the ground that the complaint was barred by limitation. The application was not rejected by invoking the provisions of Section 473 Cr.P.C. but excluding the time spent for obtaining the consent or sanction of the appropriate Government, by invoking provisions of Section 473(3) Cr.P.C. The Apex Court had found that no such sanction or consent was required under Section 13(3) of the Official Secrets Act, 1923 and, thus, period spent in obtaining the order and filing the complaint cannot be excluded under explanation to Section 473(3) Cr.P.C. However, considering the right of complainant, for extension of time under Section 473 Cr.P.C., it was held that on the facts and circumstances, the delay was explainable before the Magistrate which had occasioned on account of bonafide belief to obtain sanction for the purpose of filing the complaint. However, instead of directing the complainant to approach the trial Magistrate for the said purpose, the complainant was held to have explained the delay in filing the complaint and complaint was held to be within time without remanding the matter to the Magistrate, with observation that no useful purpose would be served again by again directing the complainant to approach the trial Magistrate for the purpose of extension of period of limitation.

20. Power of the Magistrate to extend the limitation period, in terms of Section 473 Cr.P.C., has been dealt with by the Apex Court in ***Mohd. Sharaful Haque's*** case **[(2005) 1 SCC 122],** observing that this power can be exercised only when the Court is satisfied on the facts and the circumstances of the case that the delay has been properly explained or that it is necessary to do so in the interest of justice.

21. Similarly, in ***Ramesh and others v. State of T.N.,*** **(2005) 3 SCC 507**, relying upon exposition of law explained in ***Arun Vyas's*** **[(1999) 4 SCC 690]** case supra, benefit of Section 473 Cr.P.C. was extended to the complainant and like ***Rakesh Kumar Jain's*** **[(2000) 7 SCC 656]** case supra, case was not remanded to the Magistrate for reconsideration, with observation that such course would be unnecessary and inexpedient for the reason that entitlement for extension of limitation period was apparent from the facts apparent from the record before the Apex Court.

22. The Supreme Court in ***Udai Shankar Awasthi v. State of Uttar Pradesh & another,*** **(2013) 2 SCC 435**, referring ***Japani Sahoo*** **supra;** ***Sajjan Kumar v. Central Bureau of Investigation,*** **(2010) 9 SCC 368;** and ***NOIDA Entrepreneurs Association v.***

NOIDA & others, **(2011) 6 SCC 508**, has held that question of delay in launching a criminal prosecution may be a circumstance to be taken into consideration while arriving at a final decision, however, the same may not itself be a ground for dismissing the complaint at the threshold, and moreover the issue of limitation must be examined in light of gravity of the charge in question. In the same judgment, referring ***State of Maharashtra v. Sharadchandra Vinayak Dongre & others,*** **(1995) 1 SCC 42**; and ***Tara Dutt's*** case supra, it has been reiterated that the Court, while condoning delay has to record the reasons for its satisfaction, and the same must be manifest in the order of the Court itself, and the Court is further required to state in its conclusion, while condoning such delay, that such condonation is required in the interest of justice.

23. Main issue referred before the Larger Bench, in ***Sarah Mathew's*** case **[(2014) 2 SCC 62],** was to determine the relevant date for the purpose of computing the period of limitation under Section 468 Cr.P.C. However, certain observations made therein after taking into consideration earlier pronouncements, being referred hereinafter, would be relevant for the purpose of present case. In this judgment, the Supreme Court has observed that before introducing Chapter XXXVI in Cr.P.C., approach of the Court, while dealing with cases of delay in launching prosecution, was that in any case prosecution could not have been quashed on the sole ground of delay in filing the same but it may be a circumstance to be taken into consideration in arriving at final verdict and by itself it affords no ground for dismissing the complaint. It is further observed that this position underwent a change, to some extent, after introduction of Chapter XXXVI was introduced in Cr.P.C. It has also been observed that it is equally clear that law makers did not want cause of justice to suffer in genuine cases and, therefore, in Chapter XXXVI Cr.P.C., provisions of exclusion of time in certain cases (Section 470), for exclusion of date on which the Court is closed (Section 471), for continuing offences (Section 472) and for extension of period of limitation in certain cases (Section 473) have been incorporated, and it is further observed that Section 473 is crucial and it empowers the Court to take cognizance of an offence after the expiry of the period of limitation, if it is satisfied, on the facts and in the circumstances of the case, that the delay has been properly explained or it is necessary to do in the interest of justice and, therefore, Chapter XXXVI Cr.P.C. is not loaded against the complainant. Further that it is true that the accused has a right to have a speedy trial which is a facet of Article 21 of the Constitution, but Chapter XXXVI Cr.P.C. does also not undermine this right of accused, and while this Chapter encourages diligence by providing for limitation it does not want all prosecutions to be thrown overboard on the ground of delay, rather it strikes a balance between interest of the complainant and interest of the accused. It has further been observed that where the Legislature wanted to treat certain offences differently

it provided for limitation in the Section itself, for instance, Sections 198(6) and 199(5) Cr.P.C., however, it chose to make general provisions for limitation for certain types of offences for the first time and introduced them in Chapter XXXVI Cr.P.C. The Supreme Court has further observed that the object of criminal law is to punish perpetrators of crime and a crime never dies, but at the same time it is also the policy of law to assist the vigilant and not the sleepy. Chapter XXXVI Cr.P.C. maintains the balance between aforesaid object and policy of Law.

24. Though issue with respect to applicability of Section 473 Cr.P.C. to the offences prescribed in other enactments is not directly involved in present case, however, for clarity it would be relevant to refer that in ***P.P. Unnikrishnan & another v. Puttiyottil Alikutty & another,*** **(2000) 8 SCC 131**, the Apex Court has held that the extension of period contemplated in Section 473 Cr.P.C. is only by way of extension to the period fixed as per the provisions of Chapter XXXVI of the Cr.P.C. and, therefore, this Section cannot operate in respect of any period of limitation prescribed in any other enactment. Similarly, in ***Subodh S. Salaskar v. Jayprakash M. Shah & another,*** **(2008) 13 SCC 689**, it has been observed that provisions of Section 5 of Limitation Act and Section 473 Cr.P.C. are not applicable in cases under Section 138 of the Negotiable Instruments Act.

25. Learned counsel for the petitioner, putting reliance on Para-7 of judgment of Supreme Court in ***Srinivas Pal's*** case **[AIR 1988 SC 1729]**, has contended that taking of cognizance, without condoning delay, was bad and without jurisdiction. As a matter of fact, in this para the Supreme Court has quoted the aforesaid observations by saying that attention of the Court was also drawn to judgment of Gauhati High Court wherein it is so held. As evident from Para-9 of the judgment; wherein the Apex Court has clearly observed that it was not necessary in the facts and the circumstances of that case to decide the issue whether cognizance was properly taken, whether the extension of period of limitation, under Section 473 Cr.P.C., must precede taking of cognizance of offence, whether cognizance in that case was taken on a particular date; the case was decided having regard to the nature of offence and enormous of delay of 9½ years in proceeding with the criminal prosecution with respect to a case of rash and negligent driving.

26. From aforesaid discussion, and pronouncements of the Apex Court, it is concluded as under:

(i) For the purpose of calculation of period of limitation, date of filing of complaint or institution of prosecution is relevant and not the date of taking cognizance.

(ii) The Magistrate can discharge an accused after taking cognizance of an offence by him, before the trial of the case. In a case where Magistrate takes cognizance of an offence without taking note of Section 468 Cr.P.C., most appropriate stage at which the accused can plead for his discharge is the state of framing the charge, without waiting for completion of the trial. The Magistrate will be committing no

illegality for considering that question and discharging the accused at the stage of framing the charge, if the facts so justify. While doing so, Magistrate shall consider the question of limitation, taking note of Section 473 Cr.P.C., in the light of law laid down by the Supreme Court, discussed supra.

(iii) The Magistrate has jurisdiction to consider the material placed before it and nature and gravity involved in the case for the purpose of extension of limitation period under Section 473 Cr.P.C.

(iv) The Magistrate has jurisdiction to consider the explanation put forth by complainant/ prosecution for the purpose of extension of limitation period under Section 473 Cr.P.C.

(v) The complainant/Investigating Agency has to explain the cause of delay properly to the satisfaction of the Magistrate in the complaint/ challan/final report.

(vi) Power and jurisdiction of the Magistrate to extend the period of limitation is not inhibited for not explaining the circumstances properly but even then the Magistrate has power to extend the period of limitation if he finds it necessary to do so in the interest of justice as the period of limitation can be extended in either case, i.e. either for satisfactory proper explanation of facts and circumstances causing delay or necessity to do so in the interest of justice.

(vii) Filing of application for extension of period of limitation under Section 473 Cr. P.C. is not envisaged under Cr.P.C. but the necessary ingredients required for such extension must be placed on record in complaint/final report under Section 173 Cr.P.C. However, filing of separate application, at any stage, but before final order/judgment, is also permissible.

(viii) When offence is such that applying rule of limitation will give an unfair advantage to the accused resulting into miscarriage of justice, the Court may take cognizance of an offence after the expiry of period of limitation in the interest of justice.

(ix) At the time of taking cognizance in time barred complaint/institution of prosecution, the Magistrate is required to give weightage and consideration to the provisions of Section 473 Cr.P.C. and to exercise discretion solely on the basis of well recognized principles and pass a speaking, reasoned order, indicating satisfaction or dissatisfaction with respect to proper explanation of circumstances causing the delay and/or cause for considering or not considering it necessary to extend the period of limitation in the interest of justice. Reasons for granting or disallowing extension of period of limitation must be manifest.

(x) At the time of taking cognizance of a time barred complaint or initiation of prosecution, it is not necessary for the Magistrate to call the accused as the Magistrate is empowered to extend the period of limitation on his satisfaction to the ingredients of Section 473 Cr.P.C. for which such extension can be granted. However, respondent/accused has a right to raise the issue of delayed filing of complaint/launching of prosecution at the time of conclusion of trial, more particularly with reference to the prejudice caused to him. Even otherwise calling of respondent/accused at the time of taking cognizance for dealing with issue of extension of time period would unnecessarily delay the taking of cognizance in the matter.

(xi) In case there is lapse on the part of the Investigating Agency/complainant to explain the cause of delay in filing complaint/final report, under Section 173

> Cr.P.C, and it is considered by the Magistrate that extension of the limitation period is necessary in the interest of justice, complainant/Investigating Agency may be permitted to place on record the facts and the circumstances, either by filing an application or otherwise, to satisfy the Magistrate with respect to grounds for extension of limitation period. Even otherwise, there are two limbs of Section 473 Cr.P.C., providing two different grounds for extension of time period, i.e. for proper explanation of delay or when it is necessary to do so in the interest of justice. These two grounds are independent of each other. If either of condition is fulfilled, the Court may extend the period of limitation. There may be cases wherein either of the grounds is available for extension of limitation period and there may be cases wherein both grounds exist for doing so.

27. Drug addiction is a menace causing damage to the entire society and illicit drug trafficking and drug abuse are increasing day-by-day at national and international level and to curb this evil, apart from social awareness programmes, stringent provisions for control and regulation of operation relating to the narcotic drugs and psychotropic substances have been enacted by means of NDPS Act. At the time of adjudication of cases relating to NDPS Act, the object and purpose of enactment is always to be kept in mind particularly at the time of interpretation of provisions of related enactments, and the Court, when dealing with provisions providing period of limitation for instituting prosecution, in cases of this nature, should give due weightage and consideration to the provisions of extension of limitation period, as provided under Section 473 Cr.P.C., which starts with non-abstante clause, providing that notwithstanding anything contained in Chapter XXXVI of the Cr.P.C., may take cognizance of an offence after the expiry of period of limitation, if it is satisfied on the facts and in the circumstances of the case that delay has been properly explained or that it is necessary so to do in the interest of justice.

28. In present case, as brought on record, in reply of the respondent-State, there is satisfactory explanation with respect to the facts and the circumstances in which delay has been caused in launching prosecution against the petitioner and further keeping in view the object and purpose of NDPS Act, it would be necessary to take cognizance of the offence, more particularly, in view of the explanation, now brought on record.

29. Though as held by the Apex Court supra, the Magistrate was under obligation to pass a reasoned, speaking and manifest order at the time of taking cognizance of a time-barred prosecution. But, the Magistrate has omitted to do so. However, In the light of pronouncements of the Apex Court in *Ramesh's* and *Rakesh Kumar Jain's* cases supra, I do not consider it useful to remand the case to the Magistrate to assign reasons for taking cognizance.

30. As discussed supra, in present case, plausible and satisfactory explanation for delay in instituting the prosecution exists and also keeping in view the object and purpose of

the enactment of NDPS Act, interest of society is also there in continuing the prosecution, and accordingly the petition is dismissed.

31. It is also noticeable that in present case neither complete facts were brought on record before the Magistrate nor at the time of filing the challan any single word was uttered, explaining the reasons for not filing the challan/final report under Section 173 Cr.P.C. in the Court within limitation period applicable to the present case. There is lapse on the part of the Officer, who has filed the challan, for failure on his part to place the complete facts and circumstances before the Court to satisfy it on the facts and circumstances causing delay in filing final report.

32. There is one more issue in this case. Though FIR No.147/2018, dated 22.3.2018, was registered against Sub Inspector Ankush Dogra, but, as per copy of final report submitted under Section 173(2) Cr.P.C. that FIR, placed on record with the reply of respondent-State, it is evident that cancellation of the said FIR was proposed, outcome whereof has not been disclosed. Cancellation has been proposed on the basis of explanation put forth by Sub Inspector Ankush Dogra and the said explanation, as reproduced in the reply as well as indicated in the final report under Section 173(2) Cr.P.C., is that at relevant point of time, on his transfer, vide Transfer Order dated 15.9.2017, he was relieved immediately on 26.9.2017 and at that time he was not feeling well, was also having charge of Special Investigating Team and was not present in the Office and, thus, he could not hand over the charge. The said Officer is a responsible Officer working as Sub Inspector. Further, for not responding to the wireless and mail messages of SHO, the explanation given is that since 8.12.2018 to 24.12.2018 (sic: 18.12.2017 to 24.12.2017), he was attending a course in CBI Academy, Ghaziabad and during the period from 27.1.2018 to 24.7.2018 he was on medical and earned leave. The file was requisitioned by the SHO from the said Ankush Dogra on 21.11.2017, 28.11.2017, 17.2.2018 and 12.3.2018. Even if plea of SI Ankush Dogra is considered to be true and correct, then also there is no reason for not responding to the aforesaid communications, as he attended the course w.e.f. 8.12.2017 but messages sent by SHO on 21.11.2017, 28.11.2017 are prior to that. Otherwise also, such a responsible Officer holding the post of a Sub Inspector is supposed to behave in responsible manner and at least to have knowledge that case files pertaining to investigation in five FIRs were not his personal property and he must be well conversant with the consequences of delay in investigation or launching prosecution therein. He is not only liable to face criminal proceedings but also Departmental Enquiry for dereliction in duty. His explanation for not handing over the files at the time of transfer or after relieving and for not responding to the communications of the SHO, not only appears to be false but also is definitely absurd. In case there was no one available in the office, it was incumbent upon the Officer to

report to the higher authorities, i.e. Deputy Superintendent of Police or Superintendent of Police for handing over the case files which were in his possession. He has not only illegally kept the files with him but has also obstructed further investigation and action in those cases for extraneous reasons. It appears that the Officer, proposing cancellation of FIR No.147/2018, has not applied his mind properly or probably he has been influenced by the fact that the delinquent was his colleague in the Department and thus has proposed cancellation of FIR. Concerned authorities have also failed to take departmental action and to register the FIR under proper provisions.

33. The Director General of Police, Himachal Pradesh, is directed to look into the matter personally and, uninfluenced by the observations made above, to take appropriate action(s), in accordance with law, to take the matter to logical end, with respect to (a) retention of files by Sub Inspector Ankush Dogra, (b) the omission and commission of the concerned Police Officer/authority for not taking appropriate action against him, and (c) for submitting a cancellation report in case FIR No.147/2018, registered in Police Station Una, on the basis of illogical explanation put forth by Sub Inspector Ankush Dogra; and also to seek explanation from the Officer who failed to explain the cause of delay in presenting challan in present case, also be called.

34. The Director General of Police, Himachal Pradesh is also directed to circulate necessary instructions to the Investigating Officers advising them to properly explain the facts and circumstances in the challan/final report which have caused delay, in time barred institution of prosecution so as to satisfy the Magistrate for extension of period of limitation.

35. Conclusion drawn on the basis of pronouncements of the Apex Court in Para-26 may also be circulated to the Investigating Officers and Magistrates by the Director General of Police and Registrar General of this Court, respectively.

36. Affidavit of compliance of Paras-32 to 35 be filed by the Director General of Police, Himachal Pradesh, on or before 31.12.2020.

37. The petitioner is directed to appear before the trial Court on 28.12.2020, either in person or through counsel.

38. The Registry is directed to place a copy of this judgment before the Registrar General of this Court for compliance and send back the record of the trial Court, immediately.

39. The petition stands disposed of, so also pending application, if any.

Be listed on 5th January, 2021, only for the purpose of compliance report by the Director General of Police, Himachal Pradesh.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR. JUDGE

Jarnail Singh & others ....Petitioners.

Versus

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

CWP No. 1784 of 2018
Reserved on 5.11.2020
Date of decision: 24.11.2020

Constitution of India:- Article 226- Petitioners after completing the requisite qualifying period as daily wagers were conferred the status of regular employees but were dis- regularized in the year 2013- Challenged the recruitment and Promotion Rules, Clause 10 & 11 – It was held that seniority is relevant parameters for valid induction into regular service for eligible candidates along with 50% quota- Benefit of regularization and grant of seniority to those who were senior to petitioner was found valid- Order of demotion of petitioners was valid – Writ petition was found without merit, dismissed.

For the petitioners: Mr. Goldy Kumar, Advocate.

For the respondents: Mr. Hemant Vaid & Mr. Ashwani Sharma Addl. A.Gs.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The writ petitioners, after completion of the requisite qualifying period, of, service, as, daily wagers, under, the respondents, became conferred the status, of, regular employees, against, substantive posts, and, on a substantive capacity. However, they were dis-regularized in the year 2013, and, obviously became reverted, from/as, regular Class-IV employees, to, as, daily waged workmen, under, the respondents. The petitioners, cast a challenge to Clause 10, and, Clause 11, of the apposite Recruitment & Promotion Rules, clauses whereof stand extracted hereinafter:-

10.	Method of recruitment whether by direct recruitment of by promotion, deputation, transfer and percentage to be filled in by various methods.	50% by direct recruitment and 50% by appointment from amongst the wholly paid daily waged Class-IV workers of the Department who possess at least 10 years service having 240 days in each calender year, failing which by appointment/from amongst the departmental working part-time workers who also possess at least 10 years service having 240 days in each calender year, failing which by direct recruitment.
11.	In case of recruitment by Promotion, deputation, transfer, Grade from which promotion/ deputation/ transfer is to be made.	50% by appointment from amongst the wholly paid daily waged workers of the department who possess at least 10 years Service having 240 days in each calendar years, failing which by appointment from amongst the departmental working Part time workers who

		also possess at least 10 years service having 240 days in each Calendar year as such and fullfil the Qualification as per col. 7 R&P rules. The educational qualification shall be relaxable at the discretion of the appointing authority in case the candidate is having good physique and knowledge of working in Hospital/dispensaries.

in as much as, in the afore extracted clauses, an, untenable 50%, of, substantive posts falling in the category of Class-IV employees, becoming reserved for induction(s) thereinto, from, amongst direct recruitees.

2. The prescription in the hereinabove extracted rules, a 50%, reservation, for, inductions against substantive posts, to those workmen, who hitherto render, the prescribed period, of, qualifying service, as daily waged workmen, does fall, in tandem with the verdict, rendered by this Court, on 28.7.2010, in CWP No. 2735 of 2010, titled Rakesh Kumar vs. State of H.P. & others, along with connected therewith matters, hence does not acquire any stain, of, any unconstitutionality. However, the afore prescription therein, of, 50% of substantive vacancies, falling in the stream, of, Class-IV employees, being filled up, through direct recruitment, becomes, the, *ire res controversia*, in the extant writ petition. Even though, the afore prescription also falls within the ambit, of, the constitutional parameters, enshrined in Articles 14 and 16, of the Constitution of India, (i) thereupon, may not be amenable, for, becoming unsettled, through any judicial review, being made thereof, (ii) nonetheless, amplifying fortification to the afore becomes garnered from the afore prescription, becoming validated, through verdicts, made, upon CWP No. 10464 of 2012, and, upon CWP No. 2079 of 2009, respectively titled as Inderpal Singh vs. State, and, Jugeshwar Singh vs. State. Moreover, since, the, afore verdicts, are not demonstrated to become set aside, by the Hon'ble Apex Court, hence they acquire absolute conclusivity, and, binding force.

3. Since the consequences thereof are (a) upon occurrence of substantive vacancies in the afore stream, thereupon hence at the roster point assigned for each, of the afore(s) therein prescribed category(s), and, with each being meted, with, a, 50% quota, in as much as, respectively qua direct recruitees, and, qua those daily rated workmen, who complete the ordained therein period of qualifying service, rather both acquiring, a, legal right to stake, a, claim, for, induction(s) thereinto, on a substantive basis, (b) moreover, seniority also is the relevant parameter(s), for, valid induction(s) into regular service, of, those eligible daily rated workmen wheretowhom, a, 50% quota becomes prescribed. Consequently, the adherence as made to the parameter(s), of, seniority, by the respondents in the latter(s) granting, the, benefit

of regularization, in service, to the apposite aspirants cannot be faulted. Moreover, upon the respondents, noticing that the writ petitioners, do not, fall within the point or notch, of, hence seniority assigned to all aspirants in their stream, and, rather other aspirants occurring, on the notch, of, seniority, (i) thereupon, the grant of benefit of regularization, by the respondents, to those workmen, who are senior to the petitioner(s), is condonable, and, also the order of demotion, as, made upon the petitioner(s) is valid. Conspicuously, also when the judgments supra are made against the respondent department, hence arrayed also as respondents, in the extant writ petition.

4. In view of the above observations, there is no merit in the extant writ petition and the same is accordingly dismissed. All pending applications, also stand disposed of.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR. JUDGE AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, JUDGE

Ankit ....Petitioner

Versus

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

CWPOA No. 8056 of 2019
Reserved on: 6.11.2020
Decided on 24.11.2020

Constitution of India- Article 226- Petitioner was minor when his predecessor in interest has died, who was Forest Guard- On attaining majority, he applied for his appointment on compassionate ground which was found with several shortcomings – Writ petition preferred- It was held that in the policy of government welfare measures have been provided to ascertain the financial position of families of govt, servants who die in harness – Keeping in view the above, the petitioner was not found entitled for such appointment – Grand mother of petitioner receiving family pension-Petition dismissed having no merit.

For the petitioner: Mr. Naresh K. Tomar, Advocate.

For the respondents: Mr. Hemant Vaid and Mr. Ashwani Sharma, Addl. A.Gs.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, J.

The predecessor-in-interest, of the petitioner, namely one Surender Kumar, as, divulged by his death certificate, appended with the writ petition, as, Annexure A-1, died on 20.3.2006. At the afore phase, he was performing duties, as, a Forest Guard, under, the respondents. Consequently, since in contemporaneity, vis-a-vis, the occurrence of demise, of his predecessor-in-interest, the petitioner was a minor, thereupon, upon his attaining majority, in the year 2011, he applied, for compassionate appointment, in consonance with, the then prevalent apposite scheme, hence formulated by the respondents. However, the afore

application remained not completely processed, rather, it became returned, through Annexure A-5, to the writ petitioner, for the latter, overcoming the recited therein shortcomings.

2. The writ petitioner, has uncontrovertedly failed to remove all the shortcomings, in his application, as became asked, for, to be removed, through Annexure A-5. However, yet, the writ petitioner claims, for, the issuance of a mandamus, upon, the respondent(s), for the latter(s), making his appointment on compassionate ground(s).

3. The legality, of, issuance of the espoused mandamus, upon, the respondents, enjoins an allusion being made, to, the apposite policy, as became formulated by the respondents. The relevant portion(s) thereof, are, extracted hereinafter:-

> "1) Policy:- The employment on compassionate grounds to the dependents of Govt. servants who die while in service is not to be provided as a matter of right. It should be given only in deserving cases where the family of deceased Govt. servant is left in indigent circumstances requiring immediate means of subsistence. The concerned Administrative Departments would satisfy themselves about the indigent circumstances of the family before appointment on compassionate grounds is made."
>
> Paragraph 2 of the policy provides for its applicability, in order of priority only to a widow, son or an unmarried daughter and in the case of an unmarried government servant to the father, mother, brother or unmarried sister. Paragraph 2(a) reads as follows:
>
> > "2) To whom the policy is applicable:- The employment assistance on compassionate grounds will be allowed in order of priority only to widow or a son or an unmarried daughter (in case of unmarried Govt. servant to father, mother brother and unmarried sister) of:
> >
> > > (a) a Govt. servant who dies while in service (including by suicide) leaving his family in immediate need of assistance."

4. Paragraph 4 of the policy stipulates, that, an appointment, on compassionate grounds, can be made, only to the lowest rung of Class-III and Class-IV posts, carrying a prescribed pay scale. Paragraph 8 of the Policy stipulates that requests for grant of employment assistance should be received within three years from the death of the government servant. However, where none of the children of the deceased government servant, had attained majority, at the time of death, the time limit for receipt of a request, for, appointment will be postponed to the attainment of the age, of, twenty one years, by the eldest son or unmarried daughter. Paragraph 8 is in the following terms:

> "8) Belated requests for compassionate appointments: Requests for grant of employment assistance should be received in the Deptt. concerned within three years of the death of the Government servant. In case where none of the sons/daughters of the deceased Government servant attain majority (age of 18 years) at the time of the death of the Government servant, the time limit for receipt of request for employment assistance in department concerned will be attainment of age of 21 years by the eldest

son/ unmarried daughter. No relaxation will be allowed in entertaining requests beyond the above age except in the case of sons/ unmarried daughter/widow of deceased Govt. servants belonging to the difficult areas as laid down in the Transfer Policy.

5. Paragraph 10 of the policy, stipulates that the government has introduced a number of welfare measures, which have made a significant difference to the financial position of families of government servants, who die in harness. Hence, the policy stipulates that benefits received by the family, on the account of those welfare measures "may be kept in view" while considering cases of employment assistance on compassionate grounds. The policy proceeds to enumerate the welfare measures which, on the date of its formulation, were available to families of deceased employees. Paragraph 10(c) of the Policy, which has a bearing in this case, is in the following terms:

"(c) The provision of employment assistance was introduced in 1958 and since then a number of welfare measures have been introduced by the Govt. which made significant difference in the financial position of the families of the Govt. servants dying in harness. The benefit received by the family on account of these measures may be kept in view while considering cases of employment assistance on compassionate grounds. Such measures, in brief, which are at present available to the families of the deceased employees are as under:

(i) Ad-hoc ex-gratia grant @ 10 times the emoluments which the Government servant was receiving before death, subject to a minimum of Rs. 10,000/- and maximum of Rs. 30,000/-.

(ii) Grant of improved family pension.

(iii) Grant of death Gratuity as under:-

Length of service	Rate of gratuity
a) Less than one year	2 times of emoluments.
b) One year or more but less than 5 years	6 times of emoluments.
c) 5 years or more but less than 20 years	12 times of emoluments
d) 20 years or more	Half of emoluments for every completed six monthly period of qualifying service subject to a maximum of 33 times emoluments provided that the amount of Death Gratuity shall in no case, exceed one lakh rupees.

(iv) Employees Group Insurance Scheme:- Financial assistance to the family of the deceased Government servant as under:

(i) Class-IV employees- Rs. 10,000/-

(ii) Class-III employees- Rs. 20,000/-

(iii) Class-II employees- Rs. 40,000/-

(iv) Class-I employees- Rs. 80,000/-

(v) In addition nearly 2/3rd of the amount contributed by the Government servant to the fund is also payable alongwith the above amounts.

(vi) Encashment of the leave at the credit of the deceased Govt. servant subject to the maximum of 240 days.

(vii) Entitlement of additional amount equal to the average balance in the GPF of the deceased Govt. servant during the three years immediately preceding the death of the subscriber subject to certain condition under the Deposit Linked Insurance Scheme."

6. Conspicuously the applicability of the afore policy is only to Class-III, and, Class-IV posts. Moreover, the genre of compassionate appointment, is rested, on the pedestal, of, ensuring the overcoming(s) hence in contemporaneity, vis-a-vis, the demise, of a government servant, of, the sequeling thereto financial distress, besetting the bereaved family, and/or, is for ensuring, the, overcoming(s), of, the dire indigence, besetting the bereaved family, (i) and/or in other words, it is an ameliorative measure(s), and, is an exception to the constitutional mandate, appertaining, to, appointment, to, public posts, being made rather in tandem, with, the constitutional parameters, enshrined in Articles 14, and, 16 of the Constitution, of, India.

7. Apart therefrom, the, purveying(s) to the bereaved family, the benefit(s) of pecuniary assistance, by the State, is, obviously a well thought mitigatory step(s), to, ensure therefroms, alleviation, of, financial distress, or, of indigence(s), if any, as may become encumbered, upon, the bereaved family, upon, the demise of their bread earner happening during harness. Since in contemporaneity to the petitioner, making his claim, for compassionate appointment, the respondents had fixed an income criteria of Rs. 1,50,000/- and had included therewithin, monthly pension, family pension, Dearness Allowance, and Interim Relief, (i) and, with the respondents, in their reply, meted to the writ petition, rearing a contention qua one Bhawanti Devi, the grand mother of the writ petitioner, drawing per mensem pension of Rs. 14,444/-, (ii) thereupon(s), and, also with hers becoming declared, through Annexure R-13, as, the legal heir(s), of deceased Surender Kumar, thereupon (a) the legality of inclusion of the afore family pension, within the domain, of, the apposite income criteria, (b) and/or whether the petitioner becomes, yet, entitled to claim any right of his becoming awarded compassionate appointment, is, rather to be determined. The answer to the afore becomes purveyed by a decision, rendered by the Hon'ble Apex Court, in case titled, State

of H.P. & another vs. Shashi Kumar, where to which, became assigned Civil appeal No. 988 of 2019. In the judgment supra, the Hon'ble Apex Court, had after placing reliance, upon, a string of judicial verdicts, rather vindicated the fixation of an income limit, and, also had validated the inclusion therewithin(s), of, pension/family pension. (i) Moreover, it had concluded, that the solitary judgment, as, made by the Hon'ble Apex Court, in Govind Prakash Verma's case, rather wherein(s) the afore fixation, of, income limit, and, also, of, inclusion(s) therewithin, of, family pension, had become declared invalid, rather not declaring a correct stance of law.

8. Since the conundrum, besetting this Court hence has becoming completely answered, through the afore made verdict by the Hon'ble Apex Court, and, also with the grand mother of the writ petitioner receiving, on demise of her grand son, family pension, comprised in the afore sums, sums whereof fall(s) outside the limit(s), of, the income criteria, stipulated in the apposite policy, (i) thereupon, the writ petitioner, who is part of the family of his surviving grand mother, and, when the financial distress, besetting him, and, upon his siblings, strikingly in contemporaniety with the happening of demise of his father, rather has become therethrough(s) hence fully balmed, (ii) thereupon he has no valid surviving claim, for, any mandamus, being made upon the respondents, to grant him compassionate appointment.

9. Be that as it may, even otherwise, since the petitioner, is disclosed in the reply, meted on affidavit, to the writ petition, by the respondents, hence failed, since 2011, upto now to remove all the snags, occurring in his apposite application, thereupon he is deemed to acquiesce qua his purported financial indigence, as became encumbered upon him, in contemporaneity, vis-a-vis, the demise, of his predecessor-in-interest, hence occurring during harness, rather through family pension, being granted to his grand mother, hence becoming completely redressed.

10. In aftermath, since, the holistic purpose, of, appointment(s), on compassionate ground(s), and, as becomes enshrined in the policy, formulated by the respondents, is, to tide over the financial distress or indigence(s) besetting, the bereaved family, thereupon therethrough(s) the afore, does obviously become completely satiated.

11. In view of the above observation(s), there is no merit in the extant petition, and, the same is accordingly dismissed. All pending applications also stand disposed of.

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

Kanwar Ranbir Singh & another .....Appellants.

Versus

Dalip Singh (deceased) through LRs. Shanta Devi & others

....Respondents.

CMP No. 7361 of 2019
a/w CMP(M) No. 1232 of 2019
in RSA No. 483 of 2002
Reserved on: 6.11.2020
Decided on : 24.11.2020

Code of Civil Procedure- Order 22 Rule 4, 5, 9 and 11 – Sections 151 & Section 5 Limitation Act,- Sole respondent died leaving behind his LR's. RSA dismissed for non-prosecution – Misc. application filed to condone the delay and for restoration – Held, that the the non-appearance of the counsel can not be called negligence as the situation was not in their control – Delay condoned to avoid the gross-miscarriage of justice – Appeal restored.

Presence:

For the applicants: Mr. Rajneesh K. Lall,
Advocate.

For the respondents: Mr. Owais Khan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

Since, the sole respondent, in, RSA No. 483 of 2002 is disclosed, on affidavit, to expire on, 30.8.2010, hence leaving behind his legal representatives, as, enumerated in paragraph-8 of CMP(M) No. 1232 of 2019, thereupon, through the afore application, as, becomes cast under the provisions, of, Order 22 Rules 4, 5, 9 and 11, read with Section 151 CPC, and, Section 5 of the Limitation Act, an, endevour is made, to seek substitution, of, the afore deceased sole respondent, by his LRs.

2. Since through an order, made, by this Court, on 13.6.2012, upon, RSA No. 483 of 2002, the latter became dismissed, for, non prosecution, thereupon, unless the afore order is recalled, and, also unless, the, consequent therewith effect, of, the afore appeal becoming abated, hence becomes undone, and besides, the delay, which has occurred, since 2012 upto now, becomes meted, a, tangible, and, sound explication(s), thereupon, this Court would remain unprecluded, from granting, an affirmative relief to the applicants.

3. Initially, the legal effect of the order, made, on 13.6.2012, is to be decided, on anvil of the mandate, of, Order 17 Rule 3 CPC, provisions whereof are extracted hereinafter:

> "**Court may proceed notwithstanding either party fails to produce evidence-** Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, (the Court may, notwithstanding such default)
>
> **(a)** If the parties are present, proceed to decide the suit

forthwith, or,

(b) If the parties are, or any of them is, absent, proceed under rule 2.

(b) Foremost, the afore dismissal, of, the apposite Second Appeal, hence for non-prosecution, for, want of taking(s), of, the afore imperative steps, despite several opportunities becoming afforded to the appellants, may not, per-se invite the mandate, of, Order 17 Rule 3 CPC, (c) inasmuch as, both clause(s) (a) and (b) thereof, rather inviting attraction(s), (d) upon occurrence, of, evident, failing or wanting(s), of, the litigants' concerned, vis-a-vis, the ordained acts or steps, as, become enumerated, in the opening thereof, (e) and whereafter, the Court becomes enjoined to, in the presence of the parties, hence make a decision, upon the lis, or if all the parties, or, one of them, is, absent, to proceed to recourse the mandate, cast in Order 17 Rule 2 of CPC, provisions whereof, are, extracted hereinafter:

> "2. **Procedure if parties fail to appear on day fixed**- Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by order IX or make such other order as it thinks fit."

inasmuch as, its recoursing(s), the mandate of Order 9, Rule 3 CPC, provisions where of are extracted hereinafter:

> "3. **Where neither party appears, suit to be dismissed**- Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed."

rather contemplating the dismissal, of, the suit in default, or the errant litigant, being proceeded against ex-parte, as the case may be. However, since the completion(s), of, the, array, or litigant(s), is, imperative, for hence the mandate, of, clause-2, borne in Order 17, Rule-3 CPC, becoming aroused, (f) whereas, there being an in-complete array, of, litigants, rather thereat inasmuch as one, of, the litigants, expiring, during the pendency, of, the extant appeal, before this Court, (g) thereupon, the mandate borne in clause-b, of Order 17 Rule 3 CPC, not warranting application, (h) nor also this Court, could proceed to, on 13.6.2012, decide the extant appeal, as prior thereto, the, statutory, borne therein hence condition, inasmuch, as, of, the parties, to the lis, being present thereat, is, un-accomplished, (i) inasmuch as, thereat, there is a palpable in-complete array, of, litigants, in the array, of respondents, given the demise, of one Dalip Singh, occurring during the pendency, of, the appeal, before this Court, (j) thereupon, the, mandate borne, in Order 9 Rule 3, also remains un-aroused, hence hereat.

4. Be that as it may, a reading, of, the enshrining(s), borne in Order 22 Rule-4

CPC, provision(s), whereof are extracted hereinafter;

> "4. **Procedure in case of death of one of several defendants or of sole defendant**- (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
>
> (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
>
> (3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.
>
> (4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place
>
> (5) Where-
>
> (a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and
>
> (b) the plaintiff applies after the expiry of the period specified therefore in the limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under Section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the Court shall, in considering the application under the said section 5 have due regard to the fact of such ignorance, if proved)"

(a) unveils, vis-à-vis, the demise of any party, to, the lis, perse not, casting the ill-sequel, of, the suit abating, if the right to sue survives. However, the casting, of, motions, within the appositely prescribed period, of, limitation, hence for begetting the substitution, of, the deceased litigant, by his LRs, becomes rather, the, imperatively enshrined sine-qua-none, for, the afore recoursings, hence becoming accepted by the Court(s), (b) and, yet, when the apposite application, is, not preferred within the prescribed period, of, limitation, (c)

thereupon, the suit proceedings, or the suit, or the appeal, as the case may be, ipso-facto, on expiry thereof, all becoming deemed to abate, (d) unless the litigant seeking apt substitution, outside the period of limitation, makes in his application, tangible and good cause, hence within the ambit, of, clause-5 of Order 22 Rule 4 CPC, rather in-explication, of, the happened delay, (d) whereupon, the, apposite abatement, can be ordered, to, be set aside, (e) besides an order, of, substitution can become made, on, the apposite application, even though, purportedly instituted beyond the prescribed period, of, limitation. Consequently, the combined effect, of, non-applicability, hereat, of, the mandate borne in Order 17 Rule 3 CPC, and, of, the order made, on 13.6.2012, (f) is, obviously, qua the afore order being deemed to be an order, of, deemed abatement, of, the Second Appeal.

5. Be that as it may, the extant application, was enjoined to disclose within the afore domains of the afore alluded statutory mechanism(s), rather good and sufficient cause hence precluding the applicants, to, motion this Court, within the statutorily prescribed period of time. In the application at hand, the set-forth trite apposite explications, are embodied in the factual strata, in as much as, the originally engaged counsel, by the applicants, in as much as, one Sh. Sandeep Kaushik, suffering his demise, in the year 2007, (i) and, apart from, the afore, the, power of attorney becoming also signatured by his juniors, namely one Yash Wardhan Chauhan, and, one Anil Chauhan. However, even the latters, upon occurrence of the demise of the afore Sandeep Kaushik, departed from the apposite chamber(s), whereat, the briefs of the case were kept, hence, both the afore omitted to put in their appearance, on 13.6.2012, on behalf the litigant(s) concerned, whereat for, the requisite steps becoming not taken, RSA No. 483 of 2002, became dismissed for non prosecution. Furthermore, both aforesaid became obviously precluded to make communication(s) of the afore orders to the applicants, rather the awareness of the applicants about the making of the afore order, is, underlined in the application, to become aroused from summons, in, Execution Petition, as filed, in, Civil Suit No. 15 of 2019, wherefrom RSA No. 483 of 2002 arose, before this Court, becoming received by the applicants, in the month of May, 2019.

6. The respondents contested the afore factum, and, strived to preclude the applicants, from seeking, an affirmative relief, upon the extant application, and, the underscorings borne therein unfold, (a) vis-a-vis, applicant No.-2 being a practicing Advocate, in, District Court Nahan, and, respondent No.1, working as Ahlmad, in SDM Court, and, both having talking terms, (b) and, per-se thereupon hence awareness, vis-a-vis, the demise of, the, sole respondent, falling upon the applicants, (c) and, yet their gross omission(s) to ensure his substitution, by his LRs, especially when the applicants' endeavour is inordinately procrastinated rather precludes them from seeking any affirmative relief from this Court.

7. However, it is not denied that the original counsel, as engaged by the apposite litigant, being, one Sh. Sandeep Kaushik, and, also it is not denied that the afore died in the year 2007, nor it is denied that one Yash Wardhan Chauhan, and, one Anil Kumar Chauhan, who signed, the, power of attorney along with the afore deceased counsel, engaged by the deceased respondent, rather departing, from the chamber(s) of the afore deceased Sh. Sandeep Kaushik, upon, the latter's demise. Consequently, both Sh. Yash Wardhan Chauhan, and, Anil Chauhan when remain undemonstrated to carry along with them, the briefs of the lis assigned to Sh. Sandeep Kaushik, hence, both became precluded to put in their respective appearance(s), on behalf of the sole respondent, on 13.6.2020, nor also any negligence can become ascribed to them, for, their failure to ask the litigant concerned, to take the requisite steps. Moreover, the striking factum hence emerging from the records, unfolds that the successful defendant(s), not in spontaneity to the order, made, in the year 2012, casting an apposite execution petition, before the learned Civil Judge concerned, rather theirs much belatedly therefrom, in the year 2019, casting the apposite execution petition, before the learned Civil Judge concerned, (i) the legal effects of the afore delay are that the non-applicants, despite either theirs or assumingly the applicants', holding the apposite knowledge, vis-a-vis, the happening, of, demise of the sole respondent, during the pendency of RSA No. 483 of 2002, before this Court, rather more pointedly, with the defendant(s) also being represented, by a duly engaged counsel, in RSA No. 483 of 2002, yet, the defendant(s) falling, to, in the interregnum since the year 2012, and, upto the year 2019, or, even immediately subsequent to the year 2019, hence through a scribed intimation, as made, to the litigant concerned, hence the purvey the apposite communication, (b) contrarily the successful defendant(s), through, ensuring the arousal(s) of and/or through theirs causing, the, occurrence, of, an immense delay, from, 2012 upto the year 2019, hence obviously strived to, on anvil of the dismissal, of the apposite RSA No. 483 of 2012, through an order made, on 13.6.2012, rather, disentitle the aggrieved plaintiff(s)/appellant(s), from contesting the afore appeal, on merits, strivings whereof, are uncondonable. In other words, an endevour is made by the successful defendant(s) to through the afore delay, completely oust(s) the aggrieved plaintiff(s)/appellant(s), from, causing any valid challenge, to the judgment(s), and, decree(s), rendered against them. The afore endeavour of the defendant(s) if becomes condoned, would sequel, the ill-consequences, of, gross miscarriage of justice, being done to plaintiff(s)/appellant(s).

8. Even otherwise, the afore immense delay has further consequences, of the plaintiff(s) waiving, and, abandoning the benefits, if any, as, became accrued, to them through the afore order, made on 13.6.2012, upon, RSA No. 483 of 2002, wherethrough, the appeal

became dismissed, as abated, for omission of the litigant concerned, to ensure the substitution of the deceased sole respondent, by his LRs. Consequently, the legal effects of the afore, is, the non-applicants, becoming estopped to either oust the attempt, of, the appellants, to strive, for the apposite substitution, being made, in RSA No. 483 of 2002, of the deceased sole respondent, nor can they preempt the appellants, nor this Court, to pronounce a verdict, upon,the substantial questions of law, formulated, on 1.11.2002. In other words, if the non-applicants become foisted with an entitlement, to, estop the extant recoursings, of the applicants, only, upon the latters purportedly inviting against them, the embargo of the afore delay, (i) thereupon, they would become bestowed an untenable capitalization, to derive the benefits of an order, made, on 13.6.2012, by this Court, even when they cleverly camouflaged, from this Court or had hidden from the applicants, since 2012 upto 2019, the necessity of apposite impleadment(s), in substitution of the afore deceased, sole respondent, (ii) thereupon, the afore ill- stratagems of the non-applicants, cannot equip them, to contest the application at hand, on the ground(s), of, it(s) being made outside the period of limitation, nor can, they, preempt the applicants, from, setting-forth the good and tangible explication, for, the happening of the delay. Moreso, when it carries an aura of veracity and truth. Consequently, the delay is condoned, and, the extant application is allowed. The order of 13.6.2012 is also recalled, and, the appeal is restored to its original position. 9.

Necessary corrections be carried out in the memo of parties by the Registry of this Court. Notice be issued to the newly added respondents, on steps being taken within four weeks, returnable within three weeks, thereafter.

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

Roop Singh ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 1883 of 2020
Date of Decision: November 2 , 2020

Code of Criminal Procedure- Section 439 **ND&PS Act**, Section 20- An FIR registered against the petitioner for possessing 1.267 kgs of charas- Petition u/s 439 preferred before Special Judge and Hon'ble High Court and both were dismissed- Similar application filed again on the ground that petitioner suffered from disease Covid-19 who is 58 years of age, now he has recovered but is under trauma and extereme anxiety- It was held that keeping in view his age and condition of petitioner and his family being under stress, Interim bail of two weeks was granted with conditions and on furnishing requisite bail bonds along with surety- Petition disposed of.Title: Roop Singh vs. State of Himachal Pradesh.

For the petitioner: Mr. Sunil Chauhan, Advocate.

For the respondent: Mr. Nand Lal Thakur, Addl. Advocate General, Ms. Divya Sood, Dy.AG & Mr. Ram Lal Thakur, Asst. AG.

Mr. Vijay Chaudhary, Advocate, as Amicus Curiae.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.(oral)

An under-trial prisoner, in custody since 11.12.2019, has come up before this Court under Section 439 of the Code of Criminal Procedure, 1973 (CrPC), seeking bail, under Section 20 of Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act), for possessing 1.267 kilograms of charas (Cannabis).

2. The police arrested the petitioner, in FIR No. 113 of 2019, dated 11.12.2019, registered under Section 20 of the NDPS Act, in Police Station Rajgarh, Distt. Sirmour, Himachal Pradesh, disclosing cognizable and non-bailable offenses. Earlier, the petitioner had filed a petition under Section 439 CrPC before the concerned Sessions Judge. However, vide order dated 9.1.2020, Ld. Special Judge-I, Sirmour, District at Nahan, HP, dismissed the petition. Thereafter, the petitioner had also moved similar application before this Court which as registered at Cr.MP(M) No. 91 of 2020 but the same was also rejected vide order dated 28.2.2020.

3. The petitioner who is aged 58 years and is facing trial for possessing commercial quantity of cannabis (charas) has come up before this Court seeking bail on the grounds that while under incarceration he suffered Covid-19 disease and now although he has recovered and tested negative but is under extreme anxiety and trauma.

4. In response to the petition, Mr. Nand Lal Thakur, learned Additional Advocate General has placed on record the medical record of the petitioner Roop Singh in which it is mentioned that he had suffered Covid-19 infection on 7.10.2020 but now he has no symptoms and is Covid-19 negative.

5. Heard learned Counsel for the parties and Mr. Vijay Chaudhary, learned Amicus Curiae and also gone through the data supplied by the learned Amicus Curiae as well as Ms. Aishwarya Sethuraman, Law Intern. Mr. Vijay Chaudhary, learned Amicus Curiae assisted by Ms. Aishwarya Sethuraman, Law Intern, has also drawn attention of the Court to the guidelines issued by the Government of India in this regard, information from the Mayo Clinic and Centre for Disease Control and Prevention (CDC) and various other prestigious and medical

institutions. Without referring to such data, as on date, the knowledge about Covid-19 disease is slightly more than the view of a room which one gets while peeping through its keyhole. Since it is a new disease, as such, findings are at the stage of hypothesis. Still consensus appears that the age of vulnerability starts from 55 years upwards. Furthermore, any person with co-morbidity conditions is also vulnerable depending upon the nature of organs involved or disease whether it is auto immune or of metastatic carcinomatic growth.

6. As per the medical reports of the prison, the petitioner has no co-morbidity but is 58 years of age. Mr. Sunil Chauhan, learned Counsel for the petitioner, on instructions, submits that the petitioner is under immense stress and anxiety and he further states that similar is the position of the petitioner's family members. He submits that in case this Court grants him one month's interim bail to enable him to spend some time with his family members it would certainly release his anxiety and stress.

7. Mr. Nand Lal Thakur, learned Additional Advocate General submits that in case this Court grants interim bail to the petitioner then the Court must specify the date on which the petitioner would surrender and the same should be with bond amount of Rs. 1 lac with one surety in the like amount.

8. Mr. Vijay Chaudhary, learned Amicus Curiae has drawn attention to the bail order of Hon'ble Supreme Court in SLP(Crl.) No. 2194 of 2020, titled as Rahul @ Vijay vs. State of Rajasthan, decided on 15th May, 2020, whereby the Hon'ble Supreme Court had given interim bail to a prisoner who was suffering from Covid-19.

9. Given the age of the petitioner and the contention that he and his family are under stress and anxiety and furthermore that he is apparently not of flight risk, this Court grants him interim bail for a period of two weeks (fourteen days) subject to the conditions mentioned below with outer limit that he must furnish bail bonds well in time and if he fails to furnish the bail bonds in time, still he must surrender before the concerned Jail by 27.11.2020 at 4.00 p.m. latest, and that in case he furnish bail bonds earlier then immediately on the expiry of fourteen days.

10. Thus the petitioner shall be released on interim bail subject to his furnishing a personal bond of Rs. One Lac only (INR 1,00,000/-) with one surety 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 undertaking therein to surrender before the Concerned Jail after the completion of fourteen days interim bail and under no circumstance later than 27th November, 2020, by 4.00 p.m. The furnishing of bail bonds shall be deemed acceptance of all stipulations, terms, and conditions of this bail order:

1. 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.
2. 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.
3. The petitioner shall not influence, threaten, browbeat, or pressurize the witnesses and the Police officials.
4. 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.

11. 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 order to the petitioner, in vernacular and if not feasible, in Hindi or English.

12. I express my gratitude to Mr. Vijay Chaudhary, learned Amicus Curiae and Ms. Aishwarya Sethuraman, Law Intern, for the excellent assistance rendered by them in this matter.

13. In return for the interim protection from incarceration, the Court believes that the accused shall also reciprocate through desirable behavior.

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

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

Jai Ram ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 1937 of 2020
Date of Decision: November 3 , 2020

Code of Criminal Procedure:- Section 439 Indian Penal Code- Section 377- FIR was registered against the petitioner for commission of offence under section 377 of IPC. Bail petition filed before Ld. Sessions Judge, which was dismissed- Petition filed before the Hon'ble High Court. It was held that court is under obligation to maintain a balance between all stakeholders and safeguard the interest of the victim, accused, society and state. Petition allowed keeping in view

the background, family and petitioner being without criminal history subject to furnishing bail bonds and on strict terms and conditions- Petition allowed.

Cases referred:
Gurbaksh Singh Sibbia and others v. State of Punjab, 1980 (2) SCC 565, (Para 30);
Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav, 2005 (2) SCC 42, (Para 18);
State of Rajasthan, Jaipur v. Balchand, AIR 1977 SC 2447, (Para 2 & 3);
Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240, (Para 16);
Dataram Singh v. State of Uttar Pradesh, (2018) 3 SCC 22, (Para 6);
Sushila Aggarwal, (2020) 5 SCC 1, Para 92;
Abhishek Kumar Singh v. State of HP, Cr.MP(M) No. 1017 of 2020;

For the petitioner: Mr. Romesh Verma, Advocate.

For the respondent: Mr. Nand Lal Thakur, Additional Advocate General, Mr. Ram Lal Thakur, Assistant A.G., and Mr. Rajat Chauhan Law Officer.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.

The petitioner, who is resident of Jharkhand and is aged 35 years is under incarceration for allegedly committing unnatural act with a cow has, come up before this Court seeking regular bail under Section 439 Cr.PC.

2. Based on a complaint, the police arrested the petitioner on 7th August, 2020, in FIR No. 130 of 2020, dated 7th August, 2020, registered under Section 377 of Indian Penal Code, 1860 (IPC), in Police Station Chowari, Distt. Chamba, Himachal Pradesh, disclosing cognizable and non-bailable offences. Earlier, the petitioner had filed a petition under Section 439 CrPC before the concerned Sessions Judge. However, vide order dated 5.9.2020 the Ld. Sessions Judge, Chamba Division, Chamba, HP, dismissed the petition.

FACTS:

3. Briefly, the allegations against the petitioner are that on 7th August, 2020, complainant Ranjit Singh informed Police Post Sihunta, falling within the jurisdiction of Police Station Chowari, Distt. Chamba, that the petitioner, who is a mason, is his neighbour and when in the morning he went towards his cowshed he noticed that the petitioner was involved in an unnatural act with his cow. On this, he confronted the petitioner but he ran away from the spot. Based on this information, the police registered the aforesaid FIR against the petitioner.

PREVIOUS CRIMINAL HISTORY

4. The petitioner's criminal history relating to the offences prescribing sentence of greater than seven years of imprisonment or when on conviction, the sentence imposed was more than three years: Ld. Counsel for the petitioner states on instructions that the accused has no criminal history, and the status report does not confront it.

SUBMISSIONS:

5. Mr. Romesh Verma, learned Counsel for the petitioner contends that the petitioner is in judicial custody since 7th August, 2020, and because he is not native of this place as such his family is virtually at the verge of starvation. He further submits that investigation is complete and further incarceration of the petitioner would serve no purpose. He also submits that the presence of the petitioner can always be secured because he is a permanent resident of Bastipur, P.O. Baagjuma, Teh. & Police Station Govindpur, Distt. Dhanbad, Jharkhand.

6. While opposing the bail, the alternative contention on behalf of the State is that if this Court grants bail, such order must be subject to conditions, especially of not repeating the criminal activities.

ANALYSIS AND REASONING:

7. 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.

8. 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. However, while deciding bail applications, the Courts should discuss evidence relevant only for determining bail. The difference in the order of bail and final judgment is similar to a sketch and a painting. However, some sketches are in detail and paintings with a few strokes.

9. Although the allegations against the petitioner are grave but this Court cannot lose sight of the fact that the petitioner was not employed as a servant by the complainant and thus his access to the cow shed could not have been easily noticed in the morning and secondly that he is a married man with his wife residing with him. Further there is no allegation of any criminal history including sexual offence depicting pervert mind. These factors, without extending them further, make out a case for bail.

10. 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.

11. 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. In **Sushila Aggarwal**, (2020) 5 SCC 1, Para 92, the Constitutional bench held that unusually, subject to the evidence produced, the Courts can impose restrictive conditions.

12. 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.

13. 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 Rupees 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, Dalhousie, Distt. Chamba, 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.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 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.

d) 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.

e) 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].

f) The concerned Court may also inform the accused about the issuance of bailable and non-bailable warrants through the modes mentioned above.

g) In the first instance, the Court shall issue summons and may send such summons through SMS/ WhatsApp message/ E-Mail.

h) 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.

i) 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.

j) 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.

k) 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.

l) 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.

m) 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. In return for the protection from incarceration, 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 AJAY MOHAN GOEL, J.

Anshul Guleria

....Petitioner.

Versus

State of Himachal Pradesh and others

....Respondents.

CWPOA No.3318 of 2019
Reserved on: 28.09.2020
Decided on: 30.10.2020

Constitution of India:- Article 226 – Petitioner applied for physical education teacher – Respondents altered answer of three questions in revised key and scored one mark less from the last selected candidate - aggrieved by the conduct of respondent preferred writ petition. It was held that examining authority should give opportunity before issuing final merit or final answer key to the candidates whose correct answers are likely to be adversely effected on the basis of acceptance of objections raised by other candidates- directions issued for future and petitioner was awarded cost of Rs. 5000/-.

For the petitioner: Mr. Sanjeev Bhushan, Senior Advocate, with Mr. Rajesh Kumar, Advocate.

For the respondents: Mr. Sumesh Raj, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General, with Ms. Divya Sood, Deputy Advocate General, for respondents No.1 and 2-State.

Mr. Raj Kumar Negi, Advocate, for respondent No.3.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this writ petition, the petitioner has sought a direction to respondent No.3 to correct the options of Question Nos.8, 37, 39 and 49 and thereafter award the marks for such right answers to the petitioner. Further prayer has been made for issuing direction to respondent No.3 to recommend the name of petitioner for the post of Physical Education Teacher and to the respondent-Department to offer appointment to the petitioner against the post of Physical Education Teacher.

2. Brief facts necessary for adjudication of the present petition are that respondent No.3 advertised the posts of Physical Education Teacher on the asking of respondents No.1 and 2 in the year, 2013. Petitioner also applied for being considered for appointment against the post, in question. The date of written test which was to be of objective nature, was 21.07.2013, as is evident from Annexure P1, the admit card of the petitioner. His Roll Number was '75403'. As per the petitioner, result of written test was declared on 01.12.2013 and he was declared qualified in written test and was thereafter called for interview. Respondent No.3 recommended the name of 35 candidates for the posts of Physical Education Teacher and the last candidate recommended in unreserved general category was the one, who had secured total 187 marks. Though, the petitioner had secured 159 marks in written test, yet, he was not sure about his final position, as he was not knowing how many marks were awarded to him in the interview. He applied for said information under the Right to Information Act. Though, initially his request was rejected, but later-on, vide Annexure P3, the information was supplied to him, vide letter dated 12.02.2014. In terms of the said information, petitioner was astonished to see that respondents had altered the answers of three questions in the revised key, which initially were marked as correct and apart from this, information also demonstrated that petitioner had secured 186 marks in all, i.e., just one mark less than the last candidate recommended in general unreserved category. According to the petitioner, the answers which were post revision given as correct key answers with regard to Question Nos.37, 39 and 49, were palpably wrong and similar was the case with Question No.8. As per petitioner, on account of this, he stood denied marks for answering the questions correctly, whereas, the candidates, who stood appointed, were wrong beneficiaries of the revised key answers so prepared by respondent No.3. It is in this backdrop that the petition stood filed by the petitioner with the prayers already enumerated hereinabove. It stands mentioned in the petition that the selected candidates were not being impleaded as party respondents as there

were enumerable posts of Physical Education Teachers lying vacant in different Schools of the State.

3. Respondents No.1 and 2 have filed a joint reply to the writ petition and respondent No.3 has filed a separate reply. Whereas, the stand of respondents No.1 and 2 is that since the cause of action pertained to respondent No.3, therefore, the grievance of the petitioner is to be redressed by the said respondent, the stand of respondent No.3 is that after conducting written/screening test for the post of Physical Education Teacher on 21.08.2013, the replying respondent had put up the answer keys in the webpage of the Board inviting objections from the candidates within seven days on the answers given in the provisional answer keys. Certain candidates had raised objection against the answers of Question Nos.37, 39 and 49. As merit was found in the objections so raised, therefore, necessary corrections were carried out in the answer keys of the said questions and thereafter revised final answer key was displayed on the basis of which, the recommendations were made. It is also the stand of respondent No.3 that as far as Question No.8 is concerned, the provisional key answer remained unchanged and further the petitioner had failed to raise any objection with regard to the provisional answer key of this question, therefore, such plea could not be taken by the petitioner subsequently. On these basis, respondent No.3 has prayed for dismissal of the writ petition.

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

5. When this case was listed on 20.07.2020, this Court passed the following order:-

> *"By way of this petition, the petitioner has prayed for the following reliefs:-*
> *"(i) That a writ in the nature of mandamus may be issued directing the respondents, particularly Respondent No.3 to correct the options of question No. 8, 37, 39 and 49 and thereafter award the marks for such right answers to the present petitioner with further directions to the Respondent No. 3 to recommend the name of the petitioner for the post of Physical Education Teacher.*
> *(ii) That further a writ in the nature of mandamus may very kindly be issued directing the respondents No. 1 and 2 that after the recommendation is made by Respondent No. 3 for offering the appointment to the post of Physical Education Teacher to the petitioner in the interest of justice and fair play.*
> *(iii) The respondents may kindly be directed to produce the entire record pertaining to the case before this Hon'ble Court for its kind perusal.*
> *(iv) Or any other relief as this Hon'ble Court deems fit and proper in the facts and circumstances of the case may also kindly be passed in favour of*

the petitioner and against the respondents in the interest of justice and fair play."

2. Mr. Sanjeev Bhushan, learned Senior Counsel appearing for the petitioner has primarily argued that in this case after the provisional answer key of the written test conducted by the respondent-Selection Board was issued, some of the dissatisfied candidates submitted their objections to the same. In response to the said objections raised by some of the candidates, alternations were made and answer key was revised but persons like the petitioner, whose earlier answers were initially found correct as per respondent No. 3 but were subsequently altered to their disadvantage, were not informed about the same.

3. Learned Counsel for respondent No. 3 has not been able to deny this fact so pointed out by learned Senior Counsel. He has handed over to the Court the instructions imparted to him by Secretary of respondent No. 3, dated 16.03.2020, relevant portion of which reads as under:-

> *"On the given matter, I am directed to say that this Commission had advertised the posts of Physical Education Teacher under Post Code 347 vide advertisement No. 23/2012 dated 15.09.2012 by inviting applications from the eligible candidates.*
>
> *The applicant had applied for the aforesaid post and was admitted provisionally to participate in the objective type written screening test against Roll No. 75403 (Question Booklet Series-C) held on 21st July 2013. It is also submitted that soon after conducting the written screening test for the post of Physical Education Teacher, the provisional answer key(s) was published by the Commission on its website on 23-07-2013 and objections were invited from the candidates within seven days i.e. up to 31.07.2013 against the answers of questions of the provisional answer key (s) alongwith documentary proof. The objection(s) received from the candidates on the answers of questions given in the provisional answer key(s), were examined by the panel of experts and only after the opinion of the panel of experts, the answer(s) keys were finalized/revised and the answer sheets of all the appeared candidates were evaluated. It is pertinent to mention here that earlier to avoid multiple key(s) were not hosted on the web-site of the Commission with the assumption that the applicants may also object the final answer key(s) and in such manner the selection process initiated for a particular post would never come to an end. It is further submitted that from 17.10.2018 onwards the final answer key(s) of all the post codes after its vetting by the expert panels are also uploaded on the web-site of the Commission at the time of declaration of the result of written screening test for the information of the candidates.*
>
> *You are, therefore, requested to apprise the Hon'ble Court of the facts and defend the aforesaid case accordingly."*

4. In my considered view, even without going into the factual aspect as to whether certain key answers subsequently declared by respondent No. 3 are correct or not, the very mechanism adopted by the respondents herein is arbitrary. The stand taken by them that in case the final answer keys are hosted on website, then, the selection process would never come to an end because the possibility of some other

candidate raising the objections to the same cannot be ruled out, does not satisfies the judicial conscious of this Court. This Court concurs that at some stage there has to be finality to everything but a candidate whose answer was initially found to be correct by respondent No. 3, cannot be kept in lurch by rendering him remedy less if subsequently respondent No. 3 comes to a contrary conclusion. This is more so because herein we are dealing with the issue of public employment.

Faced with this situation, both learned Additional Advocate General as well as learned Counsel for respondent-Board pray for and are granted a week's time to have instructions in the matter.

As prayed for, list on ***27.07.2020****."*

6. In the subsequent hearings, request was made on behalf of learned counsel for the parties that the case be heard on merit and, accordingly, arguments were heard on merit.

7. Before proceeding further, it is apt to mention at this stage itself that ordinarily, Courts do not enter into footsteps of the experts, who set the test papers and also prepare the answer keys on the basis of relevant text. That being the job of the experts, is best left to the experts themselves and it is settled law that the scope of interference in this regard by the Courts is limited.

8. However, in this case, there is one extreme important issue which requires consideration and which will be answered by the Court. It is not in dispute that after provisional answer keys were uploaded by respondent No.3 of the written test in issue, certain objections were submitted by the candidates, who had participated in the written test with regard to correctness of some of the provisional answer keys. The petitioner not being aggrieved by the provisional answer keys, did not submit any objection. It is clearly borne out from the record of the case that on the basis of objections which stood received by respondent No.3 from other candidates, the provisional answer keys of some of the questions were altered. Thereafter, final answer key was circulated by respondent No.3 on the strength of which recommendations were made by respondents No.1 and 2 for appointment. In this process, what has happened is this that persons like the petitioner, who earlier were not aggrieved by the provisional answer keys, but whose marks stood altered on the basis of objections raised to some of the provisional answer keys by other candidates, have been gravely prejudiced as not only their marks got revised on the basis of objections which were raised to some of the provisional answers by other candidates, moreover, no opportunity was given to him before reduction of marks which has gravely prejudiced the petitioner. This Court understands that there has to be finality to everything, but this does not means that a person can be condemned unheard in the event of any such like situation. This Court is of the considered view that in such like eventualities where the provisional answer keys are altered by the Examining Authority on the basis of

objections received against some of the answers, then before issuing a final merit list or final answer key, an opportunity has to be given to those candidates whose correct answers are likely to be adversely effected on the basis of acceptance of objections raised by other candidates. One opportunity indeed is necessary to be given and in the absence of the same, undoubtedly, great prejudice and injustice is caused to the candidates concerned, whose marks are altered to their deterrent at their back without being given an opportunity to put forth his/her version for correctness of the provisional answer keys etc. Therefore, this Court orders that respondent No.3 shall ensure that in future, in any selection process undertaken by it, if such an eventuality does arises, then those candidates who earlier might have had not submitted their objections to the provisional answer keys, but who are to be affected by changes to be made in the answers on the basis of objections filed by other candidates, are given an opportunity of putting forth their stand before the final key answers are published and acted upon.

9. Coming to the facts of this case, process in issue has taken place in the year, 2013. The petitioner in his wisdom did not implead the selected candidates as party respondents on the ground that various posts of Physical Education Teacher were lying vacant in the Schools of the State. In my considered view, it was incumbent upon the petitioner to have had impleaded the last candidate selected of the category in which he was competing, as party respondent. Otherwise also, at this stage entering into the issue of correctness of the key answers will open a Pandora box as appointments stand made way back and further scores of the candidates had appeared in the process of selection.

10. Accordingly, this writ petition is disposed of with the directions issued hereinabove to respondent No.3 to set its house in order for future and with further direction to the said respondent to compensate the petitioner by paying costs to the tune of Rs.25,000/-. Pending miscellaneous application(s), if any, also stand disposed of.

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

Shriram General Insurance Co. Ltd. Gutkar ..Appellant

Versus

Deep Kumar and another .....Respondents

FAO(MVA) No. 68 of 2020
Decided on: October 15, 2020

Motor Vehicles Act:- Section 173, 166 - Petitioner working as coolie suffered injuries in an accident – Tribunal awarded compensation of Rs. 49,14,400/- along with 9% interest p.a.-

Award challenged- It was held that claimant was not a gratuitous passenger, but was helper in the offending vehicle- He became 100% disabled permanently on account of injuries suffered – Award amount modified and claim of Rs. 62,40,160/- was awarded along with interest @ 9% p.a – Petition disposed of.

Cases referred:

Ranjana Prakash and others vs. Divisional Manager and another (2011) 14 SCC 639;

For the appellant	**:**	Mr. Virender Sharma, Advocate.
For the respondents	**:**	Mr. Varun Rana, Advocate, for respondent No.1. Mr. Vinay Mehta, Advocate, for respondent No. 2.

THROUGH VIDEO-CONFERENCING

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By way of instant petition filed under S.173 of Motor Vehicles Act, challenge has been laid to Award dated 28.9.2019 passed by learned Motor Accident Claims Tribunal-II, Mandi, District Mandi, Himachal Pradesh camp at Sundernagar, District Mandi, Himachal Pradesh in Claim petition No. 62/2016, titled Deep Kumar vs. Sh. Param Dev and another, whereby learned Tribunal below, while allowing the claim petition having been filed by respondent No.1/claimant (hereinafter, 'claimant') under S.166 of the Act, directed the appellant-Insurance Company to pay compensation to the tune of Rs.49,40,000/- to the claimant alongwith interest at the rate of 9% per annum from the date of filing of the petition till the date of deposit.

20. Precisely, the facts of the case as emerge from the record are that claimant filed a claim petition under S.166 of the Act against the owner and insurer of Truck bearing registration No. HP31A-6466, on account of injuries suffered by him in the accident on the intervening night of 8th and 9th September, 2016 at Kumarhatti Bypass road, Dharampur, District Solan, Himachal Pradesh. Claimant claimed that he was working as a Collie in the offending vehicle and was being paid Rs.10,000/- per month by the owner i.e. respondent No. 2, Param Dev. Claimant averred that he had traveled to Kakkarmajra Punjab in the offending vehicle and after it was loaded with bricks and was on its return journey to Rampur, Himachal Pradesh, it met with an accident near Kumarhatti Bypass on Chandigarh-Shimla road on account of rash and negligent driving of the driver, as a consequence of which, he suffered multiple injuries and has been rendered paraplegic and is unable to stand, walk, sit and squat and thus is totally confined to bed and unable to move his arms and head and change sides without the help of others. As per claimant, he will require permanent attendant throughout his life. Claimant also averred that on account of having rendered permanently disabled, he has been deprived of joys of life and can neither earn nor marry nor perform any other work and has been permanently crippled as

such, he is entitled to compensation to the tune of Rs.1.00 Crore under various heads from the owner and insurer of the offending vehicle.

21. owner of the offending vehicle, by way of a reply, though admitted the factum with regard to accident but denied that the accident took place on account of rash and negligent driving of the vehicle by its driver. He claimed that the driver of offending vehicle was possessing valid and effective driving licence to drive the vehicle and said vehicle was duly insured on the date of alleged accident, as such, liability, if any, can be fastened by the Tribunal on appellant-Insurance Company.

22. Appellant-Insurance Company, while refuting the claim of the claimant, claimed that since the vehicle was being driven in violation of terms and conditions of the policy and as such, it is not liable to indemnify the insured. Appellant-Insurance Company further alleged that there is connivance inter se claimant and owner of the vehicle, as such, it may be permitted to contest the petition on all the grounds/pleas. Appellant-Insurance Company pleaded that the claimant was traveling in the ill-fated truck as a gratuitous passenger and as such, its liability is not covered under the insurance policy, as such, it cannot be held liable to pay compensation. Besides above, appellant-Insurance Company averred that the amount claimed is on higher side, as such, claim petition may be dismissed.

23. On the basis of aforesaid pleadings of the parties, learned Tribunal below framed following issues on 23.12.2017:

> "1. Whether the petitioner suffered injuries due to rash and negligent driving of vehicle/truck bearing No. HP31A-6466 by its driver Parveen Kumar alias Rinku on the intervening night of 08/09.089.2016 at about 12 mid-night near Kumarhatti bypass road, Tehsil Dharampur, District Solan, H.P., as alleged? OPP
>
> 2. Whether the petitioner is entitled to the compensation, if so, from whom and what amount? OPP
>
> 3. Whether the vehicle was being driven in violation of the terms and conditions of insurance policy, as alleged? OPR-2
>
> 4. Whether the driver of the vehicle was not having valid and effective driving licence. At the time of alleged accident, as alleged? OPR-2
>
> 5. Relief."

24. Learned Tribunal below, on the basis of evidence led on record by respective parties, allowed the claim petition and held the claimant entitled to compensation to the tune of Rs.49,14,400/- alongwith interest at the rate of 9% per annum from the date of filing of the petition till the date same is paid by the appellant-Insurance Company. In the aforesaid background, appellant-Insurance Company has approached this Court in the instant proceedings, praying therein to set aside the impugned award.

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

26. Having heard learned counsel for the parties and perused the material available on record, this Court finds that primarily the challenge to the impugned award on behalf of the appellant-Insurance Company is on two grounds i.e. (1) since the claimant was traveling as a gratuitous passenger in the vehicle, insurance company cannot be fastened with liability to indemnify the insured i.e. owner of the offending vehicle, on account of compensation, if any, to the claimant and (2) amount awarded by learned Tribunal below under several heads as well as interest are on higher side as such, same need to be reduced.

27. Mr. Virender Sharma, Learned Counsel appearing for the appellant-Insurance Company, while making this Court peruse the record, vehemently argued that though the claimant claimed before learned Tribunal below that he was working as a Collie/labourer in the offending vehicle at the time of alleged accident, but bare perusal of the FIR (Ext. PW-1/A) clearly suggests that at the time of alleged accident, he was driving the vehicle. He contended that since the claimant was not having valid and effective driving licence to drive the offending vehicle, appellant-Insurance Company could not be held liable to pay the compensation on account of injuries, if any, suffered by the claimant. With a view to support his aforesaid contention, Mr. Sharma made this Court peruse the FIR, perusal whereof certainly reveals that as per claimant, Prakash Chand, who informed the police with regard to alleged accident claimant was the driver of vehicle in question at the time of accident. FIR Ex. PW-1/A, has been proved in accordance with law by PW-1, Pyare Lal, Head Constable, who in his cross-examination stated that as per information received in the Police Station, vehicle at the time of alleged accident was being driven by the claimant. While referring to the aforesaid document, Mr. Sharma contended that once, due reliance has been placed on FIR, Ext. PW-1/A, while proving factum with regard to contents thereof, same is also relevant and cannot be ignored, while determining capacity, in which claimant was traveling in the offending vehicle at the time of alleged accident. Mr. Varun Rana, learned Counsel appearing for the claimants, while refuting aforesaid submission made on behalf of appellant-Insurance Company, invited attention of this Court to the statement of RW-1, Param Dev, perusal whereof reveals that factum with regard to employment of claimant in the truck owned by RW-1 as helper stands duly admitted. Cross-examination conducted on this witness clearly suggests that respondents including appellant-Insurance Company were unable to elicit anything contrary to what this witness stated in his examination-in-chief, wherein he has categorically stated that claimant was working as a helper in the truck and the truck was being driven by Parveeen Kumar, who at the time of alleged accident was having valid and effective driving licence to drive the vehicle

in question. In his cross-examination, aforesaid witness stated that it has been wrongly recorded in the FIR that vehicle in question was being driven by claimant, Deep Kumar. He admitted that on his askance,/disclosure, police subsequently showed Parveen Kumar as driver and claimant as helper. He specifically stated that actually, Parveen Kumar was driving the vehicle and claimant had no licence to drive the vehicle.

28. Leaving everything aside, bare perusal of final report filed under S.173 CrPC, in the aforesaid FIR submitted by police, Ext. PW-2/B clearly reveals that at the time of alleged accident, vehicle in question was being driven by Parveen Kumar and not by claimant. Besides this, it also stands recorded in Challan that Parveen Kumar was driver of the vehicle and claimant was engaged as a Helper by owner of vehicle, Param Dev.

29. Having taken note of the aforesaid documents coupled with the statement of RW-1 Param Dev, owner of the offending vehicle, this Court is unable to agree with the contention raised by Learned Counsel appearing for the appellant that the claimant was traveling as a gratuitous passenger, rather it stands duly established on record that at the time of alleged accident, claimant was rendering his services as a helper in the offending vehicle and on the date of alleged accident, he had gone with the driver Parveen Kumar to Punjab for loading bricks. There is neither any dispute nor challenge, if any, has been laid to the findings of fact recorded by learned Tribunal below that in the alleged accident, claimant has become 100% permanently disabled on account of injuries allegedly suffered by him in the accident and as such, this Court sees no reason to go into that aspect of the matter. Mr. Sharma, Learned Counsel appearing for the appellant contended that learned Tribunal below has erred in taking monthly income of the claimant to be Rs.6,000/- per month at the time of alleged accident. Mr. Sharma, contended that since RW-1, owner of the vehicle was unable to substantiate his claim that claimant was being paid Rs.10,000/- per month at the time of alleged accident, by placing on record receipt, if any, learned Tribunal below could not consider the income of the claimant to be Rs.6,000/- per month at the time of alleged accident. This Court finds from the record that though, in the case at hand, RW-1, owner of the vehicle categorically stated before learned Tribunal below that at the time of alleged accident, he was paying Rs.10,000/- per month to the claimant, on account of his being helper in the offending vehicle, but since he failed to place on record some documentary evidence in this regard, learned Tribunal below applying guess work, took income of the claimant to be Rs.6,000/- per month. Since no evidence ever came to be led on record with regard to monthly income of the claimant, learned Tribunal below ought to have applied formula of minimum wages applicable at the time of accident. In the case at hand, accident took place in the year 2016, when definitely minimum wages were Rs.200 per day, as

such, learned Tribunal below has rightly presumed monthly income of the claimant to be Rs.6000/- and same cannot be interfered with.

30. Similarly, learned Tribunal below has rightly assessed loss of earning of the petitioner. Dr. Mukand Lal, PW-3, Professor, Head of Orthopaedic Department, while proving the extent of disability, has categorically deposed that disability was found to be 100% permanent in relation to whole of the body of the claimant, on 14.5.2018, whereafter disability certificate Ex. PW-2/F was issued. Though this witness was subjected to cross-examination, but he did not specifically state that disability of the claimant would improve in future.

31. Having taken note of the fact that claimant suffered 100% disability, with regard to whole of the body, it can be safely inferred that he cannot stand, sit, squat or move independently. PW-2 (claimant) has categorically stated hat he cannot move his arm without assistance of a person. Cross-examination conducted on this witness nowhere suggests that the respondents, including appellant-Insurance Company were able to extract something contrary to what this witness stated in examination-in-chief. No other evidence, if any, has been led on record by appellant-Insurance Company to prove that disability certificate issued by the Medical Board is wrong or is not based on factual position.

32. At this stage, learned counsel for the claimant argued that no addition on account of loss of future prospects has been given to the claimant and as such, same is required to be given to the claimant.

33. Since it stands duly proved on record that on account of permanent disability, claimant has been rendered totally incapacitated and is totally unable to perform his day-to-day work, learned Tribunal below has rightly awarded sum of Rs.5.00 Lakh towards hospitalization and medical expenses incurred by him in the past. Since the claimant is totally bed ridden, he is unable to do anything of his own and as such, he has been rightly held entitled for attendant charges of Rs.5,000/- per month. As has been taken note herein above, minimum wages prevalent in the year 2016 were Rs.200/- per month i.e. Rs.6,000/- per month. In the case at hand, where specially trained medical attendant is required to look after the claimant, learned Tribunal below has only awarded a sum of Rs.5,000/- per month on account of attendant charges.

34. At this stage, Mr. Virender Sharma, Learned Counsel appearing for the appellant, while referring to statement of PW-3. Dr. Mukand Lal, made a serious attempt to persuade this Court to agree with his contention that since the medical officer has nowhere stated that the claimant on account of his having been rendered permanently disabled, requires attendant throughout his life, no amount could have been awarded by learned Tribunal below, on this count, however, having perused the statement of PW-3 Dr. Mukand Lal, wherein he has categorically

stated that the claimant has been rendered 100% disabled in relation to his whole body and health of the claimant would not improve in future, aforesaid submission made by Learned Counsel appearing for the appellant deserves outright rejection. Once, it stands duly proved on record that the claimant on account of his having rendered permanently disabled, is unable to perform his day-to-day work, no fault, if any, can be found with the awarding of Rs.5,000/- per month, on account of attendant charges. Since at the time of accident, age of claimant was 24 years, learned Tribunal below rightly presumed life of the claimant to be 25 years and awarded sum of Rs.15.00 Lakh on account of attendant charges for future.

35. Recently, Hon'ble Apex Court in **Kajal** vs. **Jagdish Chand & Ors.** Civil Appeal No. 735 of 2020, decided on 5.2.2020, has held the injured entitled not only to addition to income on account of future prospects but has also held that while awarding amount for future attendant charges, multiplier system should be used. Relevant paragraphs of the judgment (supra) are excerpted herein below:

"Loss of earnings

20. Both the courts below have held that since the girl was a young child of 12 years only notional income of Rs.15,000/ per annum can be taken into consideration. We do not think this is a proper way of assessing the future loss of income. This young girl after studying could have worked and would have earned much more than Rs.15,000/ per annum. Each case has to be decided on its own evidence but taking notional income to be Rs.15,000/ per annum is not at all justified. The appellant has placed before us material to show that the minimum wages payable to a skilled workman is Rs.4846/ per month. In our opinion this would be the minimum amount which she would have earned on becoming a major. Adding 75% for the future prospects, it works to be Rs.6784.40/ per month, i.e., 81,412.80 per annum. Applying the multiplier of 18 it works out to Rs.14,65,430.40, which is rounded off to Rs.14,66,000/

21. Though the claimant would have been entitled to separate attendant charges for the period during which she was hospitalised, we are refraining from awarding the same because we are going to award her attendant charges for life. At the same time, we are clearly of the view that the tortfeasor cannot take benefit of the gratuitous service rendered by the family members. When this small girl was taken to PGI, Chandigarh, or was in her village, 23 family members must have accompanied her. Even if we are not paying them the attendant charges they must be paid for loss of their wages and the amount they would have spent in hospital for food etc. These family members left their work in the village to attend to this little girl in the hospital at Karnal or Chandigarh. In the hospital the claimant would have had at least two

attendants, and taking the cost of each at Rs.500/ per day for 51 days, we award her Rs.51,000/.

Attendant charges

22. The attendant charges have been awarded by the High Court @ Rs.2,500/ per month for 44 years, which works out to Rs.13,20,000/. Unfortunately, this system is not a proper system. Multiplier system is used to balance out various factors. When compensation is awarded in lump sum, various factors are taken into consideration. When compensation is paid in lump sum, this Court has always followed the multiplier system. The multiplier system should be followed not only for determining the compensation on account of loss of income but also for determining the attendant charges etc. This system was recognised by this Court in Gobald Motor Service Ltd. v. R.M.K. Veluswami9. The multiplier system factors in the inflation rate, the rate of interest payable on the lump sum 9 AIR 1962 SC 1 award, the longevity of the claimant, and also other issues such as the uncertainties of life. Out of all the various alternative methods, the multiplier method has been recognised as the most realistic and reasonable method. It ensures better justice between the parties and thus results in award of 'just compensation' within the meaning of the Act.

23. It would be apposite at this stage to refer to the observation of Lord Reid in Taylor v. O'Connor:

"Damages to make good the loss of dependency over a period of years must be awarded as a lump sum and that sum is generally calculated by applying a multiplier to the amount of one year's dependency. That is a perfectly good method in the ordinary case but it conceals the fact that there are two quite separate matters involved, the present value of the series of future payments, and the discounting of that present value to allow for the fact that for one reason or another the person receiving the damages might never have enjoyed the whole of the benefit of the dependency. It is quite unnecessary in the ordinary case to deal with these matters separately. Judges and counsel have a wealth of experience which is an adequate guide to the selection of the multiplier and any expert evidence is rightly discouraged. But in a case where the facts are special, I think, that these matters must have separate consideration if even rough justice is to be done and expert evidence may be valuable or even almost essential. The special factor in the present case is the incidence of Income Tax and, it may be, surtax."

24. This Court has reaffirmed the multiplier method in various cases like Municipal Corporation of Delhi v. Subhagwati 10 1971 AC 115 and Ors., U.P. State Road Transport Corporation and Ors. v. Trilok Chandra and Ors., Sandeep Khanduja v. Atul Dande and Ors.. This Court has also recognised that Schedule II of the Act can be used as a guide for the multiplier to be applied in each case. Keeping

the claimant's age in mind, the multiplier in this case should be 18 as opposed to 44 taken by the High Court.

25. Having held so, we are clearly of the view that the basic amount taken for determining attendant charges is very much on the lower side. We must remember that this little girl is severely suffering from incontinence meaning that she does not have control over her bodily functions like passing urine and faeces. As she grows older, she will not be able to handle her periods. She requires an attendant virtually 24 hours a day. She requires an attendant who though may not be medically trained but must be capable of handling a child who is bed ridden. She would require an attendant who would ensure that she does not suffer from bed sores. The claimant has placed before us a notification of the State of Haryana of the year 2010, 11 1966 ACJ 57 12 (1996) 4 SCC 362 13 (2017) 3 SCC 351 wherein the wages for skilled labourer is Rs.4846/ per month. We, therefore, assess the cost of one attendant at Rs.5,000/ and she will require two attendants which works out to Rs.10,000/ per month, which comes to Rs.1,20,000/ per annum, and using the multiplier of 18 it works out to Rs.21,60,000/ for attendant charges for her entire life. This takes care of all the pecuniary damages.

36. Similarly, this Court having noticed nature of injury and permanent disability suffered by claimant, in the alleged accident and its further consequences, sees no reason to interfere in the amount awarded by learned Tribunal below on account of physical and mental pain and loss of natural amenities i.e. Rs.3,00,000/-.

37. Learned Counsel appearing for the appellant argued that the learned Tribunal below has erred while awarding a sum of Rs.5.00 Lakh on account of future medical expenses. He contended that since it stands duly established on record that Ext. PW-3/C (Medical Reimbursement Form) that the amount earlier incurred on treatment of the claimant was reimbursed to father of the claimant, it can be safely concluded that in future also, amount incurred on medical treatment of the claimant, shall be reimbursed to him. However, this Court is not impressed with the submission made by Learned Counsel appearing for the appellant as such, same is rejected.

38. True it is that father of the claimant, being a Government employee, received medical re-imbursement of amount spent by him on the medical treatment of his son but such fact cannot be made basis to deny future medical expenses to the petitioner, who on account of his permanent disability would remain dependent upon medical attendant as well as medicines. At the time of accident, father of the claimant may be was there to help him but he may not available forever to help him or to meet his medical expenses. Otherwise also, claimant being totally disabled is wholly dependent upon his parents, who apart from shouldering the responsibilities of the claimant, may have other responsibilities as well, as such, amount of Rs.5.00 Lakh is just and fair and calls for no interference.

39. In view aforesaid, this Court finds no scope for interference with the impugned award, save and except that while calculating loss of income, future prospects have not been taken into consideration. If we consider that the claimant would have been earning at the rate of Rs.6,000/- per month, keeping in view the existing minimum wages at the relevant time, it is equally true that the income of the claimant would have increased with every passing year and as such, there would have been definite increase in income, but for the permanently disability earned by the claimant in the unfortunate accident, due to which not only income would be lost but his future prospects would also be lost, which are also required to be taken into consideration, while calculating overall loss of income. Since claimant was not in a regular employment at the time of alleged accident, he is entitled to 40% addition on account of future prospects and loss of income may be calculated thus:

Loss of income calculated by learned Tribunal below	= 18,14,400
40% addition on account of loss of future prospects:	=7,25,760
Total loss of income	=25,40,160

40. Besides this, this Court deems it fit to award an amount of Rs.3.00 Lakh on account of loss of prospects of marriage. The claimant, who has been rendered 100% permanently disabled, will not be able to find a bride for himself, keeping in view his medical condition and as such, he needs to be compensated for the loss of marriage prospects. Also, this Court finds that the amount of Rs.3.00 Lakh awarded on account of pain and suffering also requires enhancement keeping in view the mental and physical pain and agony, which the claimant has and will have to bear throughout his life, as such, amount of Rs.3.00 Lakh awarded on account of pain and suffering is enhanced to Rs.6.00 lakh.

41. At this stage, learned counsel for the appellant-Insurance Company argued that this Court has no power to award any extra amount/enhance the amounts already awarded by learned Tribunal below, since no cross-objections/appeal has been filed by the claimants. On the issue of power of an appellate court to make additional award, reference may be made to a judgment rendered by Hon'ble Apex Court in **Ranjana Prakash and others** vs. **Divisional Manager and another** (2011) 14 SCC 639, whereby, it has been held that amount of compensation can be enhanced by an appellate court, while exercising powers under Order 41 Rule 33 CPC. It would be profitable to reproduce following para of the judgment herein:-

> "Order 41 Rule 33 CPC enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 CPC can be pressed

into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seek compensation against the owner and the insurer of the vehicle and the tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, alongwith the owner, even though the claimants had not challenged the non-grant of relief against the insurer."

42. In view of the discussions made supra and the law laid down by Hon'ble Apex Court in the afore-cited judgments, this Court deems it fit modify the impugned award to the following extent:

Head	**Amount**
Loss of income to the extent of 100% disability	2540160
Hospitalization and medical expenses	500000
Future medical attendant charges @ Rs.5,000/- per month and assuming life of the claimant to be 25 years i.e. 5,000x 12 x 25	1500000
Compensation on account of mental and physical pain	600000
Loss of natural amenities	300000
Future medical assistance	500000
Loss of marriage prospects	300000
Total compensation	**6240160**

43. Similarly, as per prevailing rate of interest, 9% per annum is adequate and same requires no interference.

44. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal stands disposed of. Impugned award passed by learned Tribunal below is modified to aforesaid extent only. The apportionment shall remain as determined by learned Tribunal below in the impugned award.

Pending applications, if any, are also disposed of. Interim directions, if any, are vacated.

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

IFFCO TOKIO General Insurance Company Limited

..Appellant

Versus

Anil Kumar and others

.....Cross-objector/Respondents

FAO(MVA) No. 191 OF 2014 & CO No. 1 of 2015
Decided on: October 12, 2020

Motor Vehicles Act:- Section 173, 166 – Claimant suffered injuries when the vehicle in which he was travelling, met with an accident on the back for Delhi and was 40% permanent disable – Tribunal awarded claim of Rs. 9,23,126 along with interest @ 7% p.a – award was challenged – It was held that minimum wages of unskilled worker was wrongly assessed as Rs. 7000/- by the Tribunal in place of Rs. 3000/- Amount of award modified and reduced to 7,28,646/- along with same rate of interest, claimant was also awarded 40% increase on account of loss of future prospects- Appeal disposed of.

Cases referred:

Govind Yadav vs. New India Assurance Company Limited, 2012 (1) ACJ 28;

Smt. Pappi Devi and others vs. Kali Ram and others, Latest HLJ 2008 (Himachal Pradesh) 1440;

For the appellant	**:**	Mr. Jagdish Thakur, Advocate.
For the respondents	**:**	Mr. Manoj Verma, Advocate, for respondent No.1. Mr. Pratap Singh Goverdhan, Advocate, for respondents Nos. 2 and 3.

THROUGH VIDEO-CONFERENCING

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By way of instant appeal filed under S.173 of the Motor Vehicles Act, challenge has been laid to Award dated 14.8.2013 passed by learned Motor Accident Claims Tribunal-I, Solan, District Solan, Himachal Pradesh, camp at Nalagarh in MAC Petition No. 10-S/2 of 2011, whereby learned Tribunal below, while allowing the claim petition filed under S.166 of the Act ibid by respondent No. 1 /claimant (hereinafter, 'claimant'), directed the appellant-Insurance Company to pay a sum of Rs.9,23,126/- alongwith interest at the rate of 7% per annum from the date of petition till the date of actual payment.

45. Facts, as emerge from record, are that the claimant filed a claim petition under S.166 of the Motor Vehicles Act before learned Tribunal below against respondents Nos. 2 and 3 and the appellant-Insurance Company, being owner, driver and insurer of the offending vehicle bearing registration No. HP-14A-0525, for compensation, on account of injuries suffered by him in the accident, that took place on 21.10.2009. As per the claimant, on 21.10.2009, he had gone to Delhi and while returning alongwith one Netar Singh, in the offending vehicle, which was being driven by respondent No.3 in a rash and negligent manner, suffered injuries on account of

accident, near Jhirbidi Border on GT Road, Kurukshetra. Claimant was injured and removed to the hospital and matter was also reported to the Police vide Rapat No. 52, dated 23.10.2009. Though, initially first aid was given to the claimant at LNJP Hospital, Kurukshetra but subsequently, he was referred to Government Medical College and Hospital, Sector 32, Chandigarh, where he remained admitted with effect from 22.10.2009 to 20.1.2010. Claimant, in the petition averred that he had not only sustained grievous injuries in the accident but had also suffered permanent disability and had to spend more than Rs.2,00,000/- on his treatment. Besides above, claimant claimed that he was compelled to spend more than Rs.10,000/- on hiring ambulance. For having sustained grievous injuries and disability of permanent nature, claimant filed claim petition, claiming therein compensation to the tune of Rs.30.00 Lakh on account of pecuniary and non-pecuniary losses. Claimant claimed before learned Tribunal below that before the alleged accident, he was earning Rs.30,000-35,000/- per month but now on account of permanent disability suffered by him, he is unable to do regular work and as such, he is entitled to compensation from the respondents.

46. Respondents Nos. 2 and 3, by way of reply, though admitted the factum with regard to accident but claimed that wrong rapat has been registered against respondent No.2. Aforesaid respondent though admitted that the claimant was admitted to LNJP Hospital on 21.10.2009 after the accident but denied that he incurred more than Rs.2,00,000/- on his treatment. Respondents, as referred to above, admitted that the claimant was traveling in the offending vehicle on the date of alleged accident but denied that the vehicle in question was being driven rashly and negligently by respondent No.3. Respondents claimed that a truck had struck their vehicle from behind with speed, on account of which respondent No.3 lost control over the vehicle and it struck against a tree on the side of road. Lastly, aforesaid respondents averred in their reply that since the vehicle is duly insured with appellant-Insurance Company, it is liable to indemnify the claimant as far as their liability to pay compensation, if any, to the claimant, on account of injuries suffered in the accident, is concerned.

47. Appellant-Insurance Company claimed that the offending vehicle had been registered and insured as a goods carrier vehicle and was not authorised/permitted to carry passengers or goods of general public for hire or reward. Appellant-Insurance Company further averred that since the offending vehicle was being plied in violation of the terms and conditions of the insurance policy, it is not liable to discharge the liability, if any, of respondent No. 2 i.e. owner. Besides above, appellant-Insurance Company claimed that driver of the offending vehicle was not having a valid and effective driving licence to drive the vehicle, as such, it cannot be held liable to pay the compensation on behalf of respondents Nos. 2 and 3.

48. On the basis of aforesaid pleadings of the parties, learned Tribunal below framed following issues on 19.6.2012:

"1. Whether the accident was result of rash and negligent driving of the offending vehicle in question by respondent No.2, and the petitioner sustained injuries in that accident? OPP
2. If issue No.1, is proved in affirmative, whether the petitioner is entitled to compensation? If so, to what amount and from whom? OPP
3. Whether the petition is not maintainable? OPR-3
4. Whether the driver of the offending vehicle in question was not having valid and effective driving licence. At the time of accident? If so, its effect?
5. Whether the offending vehicle did not have valid registration certificate, route permit and fitness certification at the time of accident? If so, its effect? OPR-3
6. Whether the vehicle in question was being plied in violation of terms and conditions of the insurance policy?
7. Relief."

49. Subsequently, on the basis of pleadings and evidence adduced on record by respective parties, learned Tribunal below allowed the claim petition and held the appellant-Insurance Company liable to pay the compensation to the claimant, being insurer of the offending vehicle. In the aforesaid background, appellant-Insurance Company has approached this Court in the instant proceedings, praying therein to set aside the award being excessive. Similarly, claimant has also filed cross-objection against the impugned award for enhancement of the amount of compensation.

50. I have heard the learned counsel for the parties and perused the material available on record.

51. Mr. Jagdish Thakur, Learned Counsel appearing for the appellant, while referring to impugned award passed by learned Tribunal below, strenuously argued that the same is not sustainable in the eyes of law being contrary to evidence on record, as such, same deserves to be quashed and set aside. Mr. Thakur contended that the learned Tribunal below has erred in answering issue No. 6 against the appellant-Insurance Company, because as per own statement of claimant, he had gone to Delhi in connection with his personal work and was coming back in the offending vehicle, which admittedly was a goods carrier, as is evident from Ext. R-2. Mr. Thakur further contended that Ext. RW-1/B, which is Registration Certificate of the vehicle in question, stands duly proved by the owner of the vehicle, which shows that the vehicle was a 'goods carriage. Mr. Thakur, referred to S.2(14) of the Act ibid, which provides that "a goods carriage means any motor vehicle constructed or adapted for use solely for the carriage of goods or any motor vehicle not so constructed or adapted when used for carriage of goods and not the passengers". Mr. Thakur further argued that if passengers are being carried in a 'goods

carriage', in that eventuality, it is in violation of the policy and such passengers are to be treated as unauthorized/gratuitous passengers. With a view to prove aforesaid argument Mr. Thakur made this court peruse the statement of PW-1, who in his cross-examination, admitted that he alongwith one another person had gone to Delhi in a bus and after completion of work, was coming back in the vehicle in question, as such, it can be safely concluded that at the time of accident, neither he was owner of the goods nor was representing owner of goods as such, he was traveling in the vehicle as a gratuitous passenger, as such, learned Tribunal below ought not have fastened liability to pay the compensation upon the appellant-Insurance Company. Mr. Thakur further contended that the learned Tribunal below has erred in taking monthly income of the claimant as Rs.7,000/-, because no evidence worth credence has been led on record by the claimant that he was earning aforesaid amount per month. Mr. Thakur submitted that in the year 2009, minimum wages were Rs.2700/- per month in the State of Himachal Pradesh but, it is not understood from where figure of Rs.7,000/- has crept in. Mr. Thakur further contended that since no evidence ever came to be led on record with regard to 40% permanent disability allegedly suffered by the claimant, learned Tribunal below has erred in presuming that earning capacity of the claimant has been reduced to the extent of 40%, as such, impugned award is liable to be quashed and set aside on this ground. Mr. Thakur further contended that the learned Tribunal below has erred in awarding Rs.1,82,000/- to the petitioner on account of having remained admitted as an indoor patient for 91 days, at the rate of Rs.2,000/- per day, especially when no person, who was employed as an attendant at the rate of Rs.2,000/- per day, ever came to be examined. Mr. Thakur also argued that the learned Tribunal below has erred in awarding Rs.44,926/- on account of medicines, other treatment, special diet and loss of amenities of life and Rs. 75,000/- on account of pain and suffering Lastly Mr. Thakur contended that learned Tribunal below has erred in awarding Rs.5,71,200/- under the head, loss of earning by taking income of the claimant as Rs.7,000/- per month. While referring to the statement of PW-1, Mr. Thakur contended that he has not uttered even a single word in this behalf and as such, learned Tribunal below without any reason has come to a conclusion, which is liable to be set aside.

52. On the other hand, Mr. Manoj Verma, learned counsel for the claimant, while supporting the award passed by learned Tribunal below contended that since it stands duly proved on record that the claimant suffered permanent disability to the extent of 40% on account of injuries suffered by him in the alleged accident, no fault, if any, could be found with the award passed by learned Tribunal below, rather it is on lower side. Mr. Verma, contended that the learned Tribunal below has failed to grant just compensation in favour of the claimant/cross—objector, as such, grave injustice has been caused to the claimant. He

contended that the learned Tribunal below granted 7% interest on awarded amount, from the date of petition till actual realisation but no reason, whatsoever, has been assigned for not granting interest at the prevailing market rate i.e. 12%. He further contended that since claimant, who was 27 years of age at the time of alleged accident, had become disabled for rest of his life on account of having suffered 40% permanent disability, learned Tribunal below ought to have granted just and reasonable compensation under the head, loss of amenities of life, but in the case at hand, learned Tribunal below has awarded meager amount of Rs. 50,000/- and as such, same needs to be enhanced He also contended that the learned Tribunal below has not granted adequate compensation on account of pain, mental shock, harassment etc. to the claimant on account of injuries suffered by him in the alleged accident and as such a sum of Rs.50,000/- awarded under aforesaid head needs to be enhanced. Mr. Verma argued that learned Tribunal below erred in not awarding any compensation to the claimant on account of loss of income for the period he remained admitted in the hospital. He contended that the claimant is entitled to 100% loss of earning for minimum 91 days, period during which he remained admitted in the hospital. Lastly, Mr. Verma contended that the learned Tribunal below has erred by not considering monthly income of the claimant at the rate of Rs.30,000/- which stands duly substantiated by unrebutted testimony of PW-4 Onkar Singh.

53. Having heard learned counsel for the parties and perused grounds of appeal vis-à-vis reasoning assigned in the impugned award, this Court finds that primarily challenge in the appeal is on the quantum. Since there is no dispute inter se parties with regard to accident and injuries suffered by the claimant, in the alleged accident, there appears to be no occasion for this court to go into that aspect of the matter. Similarly, there is no dispute that the offending vehicle was insured with the appellant-Insurance Company.

54. Though, in the case at hand, Learned Counsel appearing for the appellant made a serious attempt to carve out a case that since the claimant was traveling as a gratuitous passenger in the offending vehicle, he is not entitled to compensation but no evidence to this effect ever came to be led on record and as such, learned Tribunal below, while deciding issues Nos.3 to 6 has rightly held that onus to prove these issues was on appellant-Insurance Company but they have failed to discharge said onus, as such, these issues have been rightly decided against the appellant-Insurance Company. Respondents Nos. 2 and 3 have placed on record documents Exts. R-1 to R-3, perusal whereof clearly suggests that the offending vehicle was a goods carrier and it was insured with the appellant-Insurance Company at the time of accident. Similarly, it stands duly proved on record that the driver of the offending vehicle was having a valid and effective driving licence..

55. Though, Learned Counsel appearing for the appellant, while referring to statement of PW-1 contended that since claimant himself stated in the cross-examination that he alongwith one another person had gone to Delhi in a bus and after completion of work, he was coming back in the offending vehicle, it cannot be concluded that he was traveling in the vehicle as owner of goods but said argument having been raised by Learned Counsel appearing for the appellant is wholly misconceived because, it is not in dispute that at the time of alleged accident, claimant was traveling in vehicle as owner of goods and as such, award is not liable to be interfered with on aforesaid count. However, having taken note of the fact that the claimant failed to lead any cogent and convincing evidence that he was earning Rs.30-35,000/- per month at the time of alleged accident, this Court finds substantial force in the argument of Learned Counsel appearing for the appellant that in that situation court ought to have taken into consideration minimum wages payable to skilled workers at the relevant time. As per own claim of the claimant, he prior to alleged accident was earning his livelihood from agricultural pursuits. Admittedly, material placed on record clearly suggest that the claimant though claimed before learned Tribunal below that he was earning income of Rs.30,000-35,000/- per month from agricultural pursuits but, in this regard, no cogent and convincing evidence ever came to be led on record. PW-4 Omkar Singh, person from Delhi though deposed that the claimant used to sell flowers in the year 1996-97 till the date of accident, to the tune of Rs.50-60,000/- but in this regard, he did not place on record any authentic proof. Though, learned Tribunal below, having taken note of the fact that no authentic record has been produced by the claimant, resorted to formula of minimum wages but, it is not understood that on what basis, learned Tribunal below arrived at a conclusion that at the relevant time, minimum wages of skilled/unskilled worker were Rs.7,000/- per month. During argument, Mr. Thakur, Learned Counsel appearing for the appellant made available copy of Notification dated 31.12.2008, published in the official gazette to demonstrate that at the time of alleged accident, minimum wages payable to unskilled labour were Rs.3000/- per month.

56. Mr. Manoj Verma, learned Counsel appearing for the claimant was not able to dispute aforesaid Notification. Since at the time of accident, minimum wages of unskilled worker were Rs.3,000/- per month, learned Tribunal below erred in taking monthly income of the claimant as Rs.7,000/- in place of Rs.3,000/-, as such, impugned award is required to be interfered in this regard. Reliance is placed upon judgment rendered by Hon'ble Apex Court in **Govind Yadav** vs. **New India Assurance Company Limited**, 2012 (1) ACJ 28, wherein it has been held as under:

> "17. A brief recapitulation of the facts shows that in the petition filed by him for award of compensation, the appellant had pleaded that at the time of accident he was working as Helper and was getting salary of Rs.4,000/- per month. The

> Tribunal discarded his claim on the premise that no evidence was produced by him to prove the factum of employment and payment of salary by the employer. The Tribunal then proceeded to determine the amount of compensation in lieu of loss of earning by assuming the appellant's income to be Rs.15,000/- per annum. On his part, the learned Single Judge of the High Court assumed that while working as a Cleaner, the appellant may have been earning Rs.2,000/- per month and accordingly assessed the compensation under the first head. Unfortunately, both the Tribunal and the High Court overlooked that at the relevant time minimum wages payable to a worker were Rs.3,000/- per month. Therefore, in the absence of other cogent evidence, the Tribunal and the High Court should have determined the amount of compensation in lieu of loss of earning by taking the appellant's notional annual income as Rs.36,000/- and the loss of earning on account of 70% permanent disability as Rs.25,200/- per annum.
>
> The application of multiplier of 17 by the Tribunal, which was approved by the High Court will have to be treated as erroneous in view of the judgment in Sarla Verma v. Delhi Transport Corporation (2009) 6 SCC 121. In para 42 of that judgment, the Court has indicated that if the age of the victim of an accident is 24 years, then the appropriate multiplier would be 18. By applying that multiplier, we hold that the compensation payable to the appellant in lieu of the loss of earning would be Rs.4,53,600/-.

57. Reliance is also placed upon judgment rendered by this Court in **Smt. Pappi Devi and others** vs. **Kali Ram and others**, Latest HLJ 2008 (Himachal Pradesh) 1440, wherein it has been held as under:

> "6. It has come in the statement of claimant Smt. Kala Devi (PW-1) that the deceased, while working as a labourer and also selling milk was having an income of Rs.4000/- per month. Importantly, there is no cross-examination on this point at all. But the fact of the matter is that no documentary evidence has been placed on record to prove the income. This is the only evidence with regard to income of the deceased on record.
>
> 7. It has come on record that the deceased was illiterate and working as a labourer. In my view, his income determined by the Tribunal i.e. Rs.50/- per day, is on the lower side. Taking the deceased to be employed as a daily wager, the minimum wages paid by the government in the year 2001 to the labourers was more than Rs.70/- per day. This is not disputed at the Bar. Therefore, the same can be made the basis for determining the income of the deceased. Thus, the monthly income of the deceased is determined as Rs.70 x 30 = Rs.2100/- and after deducing 1/3rd of the amount i.e. Rs.700/-, for the purpose of dependency is determined as Rs.1400/-."

58. As far as compensation under the head of loss of income, this court finds that it stands duly established on record that on account of permanent disability suffered by claimant in the

alleged accident, he is unable to work in the fields. PW-1, Dr. J.L. Sharma, while proving disability certificate deposed on oath that on account of 40% disability, permanent in nature, suffered by the claimant, he cannot work in the fields. Cross-examination conducted upon this witness, if is perused in its entirety, it nowhere suggests that anything contrary, to what he stated in his examination-in-chief, could be elicited from the aforesaid witness.

59. If annual income of the claimant is assessed on the basis of minimum wages, prevalent in the year 2008, income of the claimant would be Rs.3,000/- per month and for the purpose of calculating loss of income as per disability i.e. 40%, same would come to Rs.1200/- per month and thus total loss of income would be 1200x 12 x 17=2,44,800/-.

60. Recently, Hon'ble Apex Court in **Kajal** vs. **Jagdish Chand & Ors.** Civil Appeal No. 735 of 2020, decided on 5.2.2020, has held the injured entitled not only to addition to income on account of future prospects but has also held that while awarding amount for future attendant charges, multiplier system should be used. Relevant paragraphs of the judgment (supra) are excerpted herein below:

"Loss of earnings

20. Both the courts below have held that since the girl was a young child of 12 years only notional income of Rs.15,000/ per annum can be taken into consideration. We do not think this is a proper way of assessing the future loss of income. This young girl after studying could have worked and would have earned much more than Rs.15,000/ per annum. Each case has to be decided on its own evidence but taking notional income to be Rs.15,000/ per annum is not at all justified. The appellant has placed before us material to show that the minimum wages payable to a skilled workman is Rs.4846/ per month. In our opinion this would be the minimum amount which she would have earned on becoming a major. Adding 40% for the future prospects, it works to be Rs.6784.40/ per month, i.e., 81,412.80 per annum. Applying the multiplier of 18 it works out to Rs.14,65,430.40, which is rounded off to Rs.14,66,000/

21. Though the claimant would have been entitled to separate attendant charges for the period during which she was hospitalised, we are refraining from awarding the same because we are going to award her attendant charges for life. At the same time, we are clearly of the view that the tortfeasor cannot take benefit of the gratuitous service rendered by the family members. When this small girl was taken to PGI, Chandigarh, or was in her village, 23 family members must have accompanied her. Even if we are not paying them the attendant charges they must be paid for loss of their wages and the amount they would have spent in hospital for food etc. These family members left their work in the village to attend to this little girl in the hospital at Karnal or Chandigarh. In the hospital the claimant would have had at least two

attendants, and taking the cost of each at Rs.500/ per day for 51 days, we award her Rs.51,000/.

Attendant charges

22. The attendant charges have been awarded by the High Court @ Rs.2,500/ per month for 44 years, which works out to Rs.13,20,000/. Unfortunately, this system is not a proper system. Multiplier system is used to balance out various factors. When compensation is awarded in lump sum, various factors are taken into consideration. When compensation is paid in lump sum, this Court has always followed the multiplier system. The multiplier system should be followed not only for determining the compensation on account of loss of income but also for determining the attendant charges etc. This system was recognised by this Court in Gobald Motor Service Ltd. v. R.M.K. Veluswami9. The multiplier system factors in the inflation rate, the rate of interest payable on the lump sum 9 AIR 1962 SC 1 award, the longevity of the claimant, and also other issues such as the uncertainties of life. Out of all the various alternative methods, the multiplier method has been recognised as the most realistic and reasonable method. It ensures better justice between the parties and thus results in award of 'just compensation' within the meaning of the Act.

23. It would be apposite at this stage to refer to the observation of Lord Reid in Taylor v. O'Connor:

"Damages to make good the loss of dependency over a period of years must be awarded as a lump sum and that sum is generally calculated by applying a multiplier to the amount of one year's dependency. That is a perfectly good method in the ordinary case but it conceals the fact that there are two quite separate matters involved, the present value of the series of future payments, and the discounting of that present value to allow for the fact that for one reason or another the person receiving the damages might never have enjoyed the whole of the benefit of the dependency. It is quite unnecessary in the ordinary case to deal with these matters separately. Judges and counsel have a wealth of experience which is an adequate guide to the selection of the multiplier and any expert evidence is rightly discouraged. But in a case where the facts are special, I think, that these matters must have separate consideration if even rough justice is to be done and expert evidence may be valuable or even almost essential. The special factor in the present case is the incidence of Income Tax and, it may be, surtax."

24. This Court has reaffirmed the multiplier method in various cases like Municipal Corporation of Delhi v. Subhagwati 10 1971 AC 115 and Ors., U.P. State Road Transport Corporation and Ors. v. Trilok Chandra and Ors., Sandeep Khanduja v. Atul Dande and Ors.. This Court has also recognised that Schedule II of the Act can be used as a guide for the multiplier to be applied in each case. Keeping

the claimant's age in mind, the multiplier in this case should be 18 as opposed to 44 taken by the High Court.

25. Having held so, we are clearly of the view that the basic amount taken for determining attendant charges is very much on the lower side. We must remember that this little girl is severely suffering from incontinence meaning that she does not have control over her bodily functions like passing urine and faeces. As she grows older, she will not be able to handle her periods. She requires an attendant virtually 24 hours a day. She requires an attendant who though may not be medically trained but must be capable of handling a child who is bed ridden. She would require an attendant who would ensure that she does not suffer from bed sores. The claimant has placed before us a notification of the State of Haryana of the year 2010, 11 1966 ACJ 57 12 (1996) 4 SCC 362 13 (2017) 3 SCC 351 wherein the wages for skilled labourer is Rs.4846/ per month. We, therefore, assess the cost of one attendant at Rs.5,000/ and she will require two attendants which works out to Rs.10,000/ per month, which comes to Rs.1,20,000/ per annum, and using the multiplier of 18 it works out to Rs.21,60,000/ for attendant charges for her entire life. This takes care of all the pecuniary damages.

61. Keeping in view the fact that on account of disability suffered by the claimant (40%), there would be loss of income to that extent, if we assume that the income would have increased on account of future prospects, the loss of income would also be increasing, as such, like in death case, where there is permanent loss of income, in the case of permanent disability, there is permanent loss of income, of course to the extent of disability, as such, in view of law laid down by Hon'ble Apex Court (supra), claimant is entitled to some amount on account of loss of future prospects. Since the claimant was not having a regular employment, as such, he is held entitled to 40% addition on account of loss of future prospects.

62. In view aforesaid, claimant is entitled to 40% increase on account of loss of future prospects, i.e. 40% of the total income and as such, total loss of income would be Rs.2,44,800/- (established income) +40% of the established income i.e. Rs.97920/- and thus total loss of income would be Rs.3,42,720/-.

63. It is not in dispute that the claimant remained admitted as an indoor patient for 91 days i.e. with effect from 22.10.2009 to 20.1.2010, as such, he is required to be compensated for the expenses incurred by him on medical treatment including attendant charges. In the case at hand, learned Tribunal below has awarded attendant charges at the rate of Rs.2,000/- per day, which certainly appear to be on higher side, and as such, are required to be reduced to Rs.1,000/- per day. However, taking note of the fact that claimant suffered 40% disability on account of alleged accident, a sum of Rs.1,00,000/- is required to be awarded on account of special diet and loss of amenities of life as a lump sum compensation in place of Rs.50,000/- and Rs. 1,50,000/- on account of pain, suffering, trauma,, mental shock and discomfort.

64. In view of the discussions made supra and the law laid down by Hon'ble Apex Court in the afore-cited judgments, this Court deems it fit modify the impugned award to the following extent:

Head	**Amount**
Loss of income to the extent of 40% disability	342720
Compensation for medical treatment	44926
Compensation on account of being indoor patient for 91 days including attendant charges at the rate of Rs.1000 per month	91000
Compensation on account of pain, suffering, trauma, mental shock and discomfort etc.	150000
Lump sum compensation on account of special diet and loss of amenities of life	100000
Total compensation	**728646**

65. Similarly, as per prevailing rate of interest, 7% per annum is adequate and same requires no interference.

66. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal and cross-objections are disposed of and impugned award passed by learned Tribunal below is modified to aforesaid extent only. The apportionment shall remain as determined by learned Tribunal below in the impugned award.

Pending applications, if any, are also disposed of. Interim directions, if any, are vacated.

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

Prem Lal .....Petitioner

Versus

Nand Lal ...Respondent

CMPMO No. 196 of 2020
Decided on: October 6, 2020

Code of Civil Procedure:- Order 39 Rule 1 & 2- A civil suit for permanent prohibitory injunction along with application for interim relief filed by the plaintiff. The interim application was allowed by the trial court restraining the defendant from raising construction or changing the nature of suit land till final disposal – Order was challenged before the Aappellate court and it was set aside – Further challenged before the Hon'ble High Court – It was held that defendant is raising construction by extending already raised construction, already in his possession-

Plaintiff suppressed material facts purposely and intentionally - orders of the Appellate court not interfered – Petition dismissed.

Cases referred:

M/S Gujarat Bottling Co.Ltd. & Ors. v. The Coca Cola Co. & Ors., AIR 1995 2372;
Mahadeo Savlaram Shelke v. The Puna Municpal Corpn., J.T. 1995(2) S.C. 504;
Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719;
Kalawati vs. Netar Singh and others, AIR 2016 HP 85;
Ambalal Sarabhai Enterprise Ltd. v. KS Infraspace LLP Ltd., (2020) 5 SCC 410;

For the petitioner: Mr. G.R. Palsra, Advocate.
For the respondent: Mr. Surinder Verma, Advocate.

THROUGH VIDEO-CONFERENCING

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with the judgment dated 28.2.2019 passed by learned Additional District Judge, Sundernagar, District Mandi, Himachal Pradesh in Civil .Misc. Appeal No. 77/19, setting aside order dated 22.11.2019 passed in CMA No. 59-VI/2017 in Civil Suit No. 52-I/2017, whereby learned trial Court, while allowing application under Order XXXIX, rules 1 and 2 CPC, having been filed by the petitioner/plaintiff (hereinafter, 'plaintiff') restrained the respondent/defendant (hereinafter, 'defendant') from raising construction and changing nature of suit land till disposal of the suit.

2. Precisely, the facts of the case, as emerge from the record are that the plaintiff filed a suit for permanent prohibitory and mandatory injunction against the defendant with regard to suit land averring therein that the suit land comprising of Khewat No. 176, Khatauni No. 193, Khasra No. 842, measuring 00-07-10 Bigha, situate in Muhal Bhour, Tehsil Sundernagar, District Mandi, is recorded as joint between the plaintiff, defendant and other cosharers as per Jamabandi for the years 2012-13 and has not been partitioned between the parties as yet. Plaintiff averred that a portion of suit land abuts National Highway No. 21 but defendant has started raising construction on best and valuable portion of suit land. Plaintiff has claimed that he requested the defendant not to raise construction on the suit land, but in vain. Besides above, alongwith aforesaid suit, plaintiff also filed an application under Order XXXIX, rules 1 and 2 CPC, praying therein to restrain the defendant from raising construction over the suit land till the time, same is partitioned in accordance with law. With a view to have the discretionary relief of injunction during the pendency of the main suit, plaintiff specifically averred in the application that prima facie case and balance of convenience is also in his favour.

Plaintiff also averred that he would suffer irreparable loss and injury, in case interim injunction is not granted in his favour.

3. Defendant, while filing written statement as well as reply to the stay application, pleaded that he had purchased 00-06-00 Bigha of suit land adjoining to National Highway from his father and in the year 1992, he had constructed two shops and two rooms on the ground floor and in the first floor, he had built four rooms with the consent of his father, Nanku. It is further averred in the written statement that plaintiff and others had become co-owner only after the death of Nanku, around 17 years back and now National Highways Authority of India has acquired half portion of both the shops for widening of the road as a consequence of which, half portion of shops and the house is to be demolished, hence, he is raising construction on the old house extending his house 20 feet backward on the land, which was already in his possession, as he has no house to live in.

4. Learned trial Court, vide order dated 22.11.2019 allowed the application filed by the plaintiff under Order XXXIX, rules 1 and 2 CPC, thereby restraining the defendant from raising construction or changing nature of suit land till disposal of the suit.

5. Being aggrieved and dissatisfied with the aforesaid order dated 22.11.2019 passed by trial court, defendant preferred an appeal under Order XLIII, rule 1(r) CPC, before learned Additional District Judge, Sundernagar, District Mandi, who, vide judgment dated 28.12.2019, set aside the order passed by learned court below, as such, plaintiff has approached this Court in the instant proceedings, with a prayer to set aside the judgment passed by learned Additional District Judge.

6. I have heard learned counsel for the parties and perused the material available on record.

7. Factors and principles, which are to be borne in mind by a court, while considering application seeking injunction order, have been discussed in depth by this Court, while rendering judgment in case Suresh Kumar vs. Pooja, CMPMO No. 331 of 2020, decided on 9.9.2020, relevant portion, whereof is reproduced herein below:

> "3. Before adverting to the factual matrix of the case vis-à-vis prayer made in the petition at hand, this Court deems it proper to delve upon the factors and principles to be borne in mind by the court, while considering application seeking injunction order. It is well settled that before grant of injunction, court must be satisfied that the party praying for relief has a prima facie case and balance of convenience is in its favour. Besides above, while granting injunction, if any, court is also required to consider that whether the refusal to grant injunction would cause

irreparable loss to such a party. Apart from aforesaid well established parameters/ingredients, conduct of the party seeking injunction is also of utmost importance, as has been held by Hon'ble Apex Court in case **M/S Gujarat Bottling Co.Ltd. & Ors.** v. **The Coca Cola Co. & Ors.,** AIR 1995 2372. In case a party seeking injunction fails to make out any of the three ingredients, it would not be entitled to injunction. Phrases, "prima facie case", "balance of convenience" and "irreparable loss", have been beautifully interpreted/defined by Hon'ble Apex Court in case **Mahadeo Savlaram Shelke** v. **The Puna Municpal Corpn.,** J.T. 1995(2) S.C. 504 relying upon its earlier judgment in **Dalpat Kumar** v. **Prahlad Singh**, (1992) 1 SCC 719 has held as under:

> "...the phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of justice. The court would be circumspect before granting the injunction and look to the conduct of the party, the probable injury to either party and whether the plaintiff could be adequately compensated if injunction is refused. The existence of prima fade right and infraction of the enjoyment of him property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury but means only that the Injury must be a material one, namely one that cannot be adequately compensated by way of damages. The balance of convenience must be in favour of granting injunction. The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. The court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit.""

8. In the aforesaid backdrop, as well as law discussed herein above, this Court would now proceed to decide the controversy at hand. Having perused the material available on record

and heard learned counsel for the parties, this Court finds no illegality or perversity in the findings recorded by learned Additional District Judge, while reversing the restraint order passed by learned court below, especially when it stands duly established that there are constructions on scattered portions of land in question and defendant is raising construction by extending already raised construction on the backside of land, which is already in his possession. Though, in the case at hand, pleadings as well as documents adduced on record by respective parties indicate that nature of suit land is still joint, becuase, admittedly, till date no partition has taken place inter se parties in accordance with law but the plaintiff has not been able to dispute that his predecessor-in-interest, Nanku, during his life time sold 00-06-00 Bigha out of suit land, adjoining to National highway to the defendant and delivered possession to him, whereafter, defendant raised two story building on the spot. Plea of the plaintiff that the defendant has raised construction on the suit land, does not appear to be correct, especially in view of stand taken by the defendant in his written statement and reply to the stay application, wherein he has stated that his father, Nanku, had sold 00-06-00 Bigha out of suit land adjoining to National highway to him, whereafter he raised two storied building on the spot during his lifetime. As per defendant, he constructed shops on ground floor and two rooms opposite the shops and four room in the upper story. His father, late Nanku, who on account of sale in favour of his son i.e. defendant had become co-owner, never raised any objection with regard to construction raised by defendant on a portion of land sold to him by his father. As per pleadings adduced on record by defendant, after death of his father, Nanku, land was inherited by his other brothers, sisters and mother. Prem Lal i.e. plaintiff is one of the brothers of the defendant. Defendant has averred in the pleadings that National Highways Authority of India has acquired his building adjoining to NH and portion of it is demolished, as a consequence of which, he is raising new construction by extending already constructed building on the land which is already in his possession. Record reveals that aforesaid pleadings adduced on record by defendant have not been refuted by the plaintiff by way of replication/rejoinder. Copy of Jamabandi for the years 2012-13 on record supports the case of the defendant. Suit land is 00-17-18 Bigha and in the Jamabandi, it has been shown that it has total 1611 shares, out of which Mohan Lal, Bansi Lal, Kanhaiya Lal, Prem Lal, Kamla Devi, Tara Devi, Seema Devi and Smt. Kunta Devi, i.e. sons, daughters and widow of Nanku have 952 shares. It further stands recorded in the Jamabandi as referred to above that Nand Lal son of late Nanku has remaining 695 shares and all of them are owners-in-possession.

9. From the careful perusal of aforesaid Jamabandi, factum with regard to separate possession of defendant in the suit land, is duly established. Similarly, this Court finds that pursuant to sale made by Nanku in favour of defendant, he came to be described as owner-in-

possession qua 695 shares, which itself suggests that the suit land though might not have been legally partitioned but the same stands otherwise duly partitioned inter se parties. In case, there had been no sale by Nanku, probably there was no requirement of division of shares, as has been shown in the Jamabandi. In that eventuality, all 1611 shares would have been owned by all the sons, daughters and widow of the deceased Nanku in equal shares. Careful perusal of Jamabandi clearly reveals that the land in question stands divided in two parts i.e. 952 shares have been shown in the share of the sons, daughters and widow of Nanku, except Nand Lal, i.e. defendant, in equal shares whereas, share of Nand Lal has been separated and has been shown /reflected accordingly, in the Jamabandi. All these facts, as have been taken note herein above, prima facie show that Nand Lal, defendant, has is own defined exclusive share in the suit land and he was one of the cosharers with his father Nanku when he was alive. As has been taken note herein above, there is no specific denial to the averments made by the defendant that he had purchased 00-06-00 Bigha out of suit land, from his father but otherwise also, said fact stands duly established on account of entries recorded in the Jamabandi, as has been taken note herein above. Plaintiff alongwith his brothers and sister except the defendant stepped into the shoes of his father Nanku, after his death, whereas, defendant had already become one of the cosharers with his father, Nanku after having purchased 00-06-00 Bigha out of suit land from his father, meaning thereby that the plaintiff as well as other sisters and brothers, save and except defendant, were stranger to the suit land till the time, they inherited the same from the share of their late father, after his death. Similarly, this Court finds that there is no rebuttal, if any, to the claim of the defendant that he raised construction on the land abutting to roadside during the life time of his father, Nanku, who never raised objection to the construction by defendant, rather, he consented for such construction activity. It is also not in dispute that the defendant having raised construction during the life time of Nanku, started enjoying the same during the life time of Nanku. It is also not in dispute that NHAI issued notice to the defendant to demolish the existing structure for widening of the road and as such, defendant had no option but to raise construction on the remaining part of vacant land, which is in his possession by virtue of sale deed. Though, in the case at hand, plaintiff has claimed that since the suit land is joint inter se parties, defendant has no right to raise construction until its partition but, pleadings adduced on record clearly suggest that the construction stood already raised on the portion of suit land abutting National highway and at present defendant on account of demolition order issued by NHAI has proposed to raise construction towards backside on the land which is in his possession.

10. Leaving everything aside, once Nanku had permitted cosharer i.e. defendant to raise construction on suit land, suit land cannot be considered to be joint, having not been

partitioned, because otherwise raising of permanent construction amounts to effecting compulsory partition. This court finds force in the submission made by learned counsel appearing for the defendant that character of suit land ceased to be joint after construction on the portion of the same by defendant, especially when it stands admitted that Nanku (cosharer) never raised objection to the construction on the so called 'best portion of suit land'. Since plaintiff alongwith other legal heirs of Nanku stepped into shoes of Nanku, after his death, they cannot lay any independent claim without being influenced by acts of his predecessor-in-interest Nanku, who during his life time never raised objection with regard to construction raised by the defendant with regard to on the joint land. Moreover, Nanku, after having effected sale in favour of the defendant, never considered the suit land as joint and as such, suit land cannot be considered to be joint for the purpose of consideration of plea raised by the plaintiff as he has merely stepped into the shoes of Nanku. Mere pleading that the suit land is joint inter se parties and not partitioned hence no cosharer could raise construction on joint land, is of no consequence in the facts and circumstances of the case, wherein it stands duly established that the defendant after having purchased portion of suit land from his father, raised construction during his life time. Plaintiff could have filed suit for partition and separation of his share while claiming consequential relief of injunction and plead that the defendant was raising construction on suit land not in his possession or exceeding his share and in case such construction is permitted, it will amount to his ouster but, interestingly, suit at hand has not been filed on such premise, rather, plaintiff concealed material facts from the court, while filing the suit, especially with regard to sale made by his father in favour of the defendant in the year 1992, without there being any partition of suit land. Moreover, raising of construction by the defendant has been nowhere denied by the plaintiff in his pleadings and construction otherwise prima facie stands proved from the copy of notice received by the defendant from NHAI for pulling down the structure. Moreover, it is not the case of the plaintiff that no structure was acquired by NHAI and no structure is being demolished. As has been observed above, defendant has categorically stated in his written statement as well as reply to stay application, with regard to purchase of land by him from his father and thereafter raising of construction but such pleadings have been neither refuted nor admitted. Though, plaintiff while filing suit has claimed that the defendant is raising construction on valuable portion of suit land towards roadside but, such plea is factually incorrect because the material available on record clearly reveals that the construction on the roadside was raised by the defendant somewhere in the year 1992, during the life time of his father and now the same is being pulled down by the NHAI for widening of road. In case **Kalawati vs. Netar Singh and others**, AIR 2016 HP 85, this Court has categorically held that in case a party does not specifically deny the averments made by an

opposite party in written statement/reply, averments so made in the plaint are deemed to be correct and court must give due weightage to the same. In the case at hand, as has been described herein above, averments made by the defendant with regard to purchase of portion of suit land and thereafter construction on the same have not been specifically denied by the plaintiff, as such, said assertions are presumed to be correct.

11. Grant/refusal of relief of temporary injunction is purely an equitable relief and while refusing/granting same, court has to weigh several factors before coming to a definite conclusion. Though there are three basic ingredients, which are to be taken into consideration by a court while considering prayer, if any, for interim relief i.e. prima facie case, balance of convenience and irreparable loss and injury. All these factors are required to be comparatively examined by the court, but over and above, all these factors, conduct of a party seeking discretionary relief is of utmost importance. In the case at hand, material adduced on record by respective parties compels this Court to conclude that the plaintiff failed to approach the court with clean hands, as such, inference can be drawn that he, with a view to have interim order in his favour, suppressed material facts purposely and intentionally. In the case at hand, no irreparable loss and injury, which cannot be compensated in monetary terms, would be caused to the plaintiff in case injunction is not granted to him, rather, irreparable loss and injury would be caused to the defendant, in case interim injunction, as has been prayed for, is allowed.

12. Hon'ble Apex Court in **Ambalal Sarabhai Enterprise Ltd.** v. **KS Infraspace LLP Ltd.**, (2020) 5 SCC 410 has held that apart from the existence of a prima facie case, balance of convenience, irreparable injury, the conduct of the party seeking the equitable relief of injunction is also very essential to be considered. Hon'ble Apex Court has held as under:

> 15. Chapter VII, Section 36 of the Specific Relief Act, 1963 (hereinafter referred to as 'the Act') provides for grant of preventive relief. Section 37 provides that temporary injunction in a suit shall be regulated by the Code of Civil Procedure. The grant of relief in a suit for specific performance is itself a discretionary remedy. A plaintiff seeking temporary injunction in a suit for specific performance will therefore have to establish a strong primafacie case on basis of undisputed facts. The conduct of the plaintiff will also be a very relevant consideration for purposes of injunction. The discretion at this stage has to be exercised judiciously and not arbitrarily.
>
> 16. The cardinal principles for grant of temporary injunction were considered in Dalpat Kumar vs. Prahlad Singh, (1992) 1 SCC 719, observing as follows :
> "5…Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that noninterference by the Court would result in "irreparable injury" to the party seeking relief and that there is no

other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

17. The negotiations between the plaintiff and the defendant is reflected in approximately 17 emails exchanged between them commencing from December 2017 to 31.03.2018. The file size of the attachment to the mails has varied from 48-5052485756 KBs indicating suggestions and corrections from time to time. The WhatsApp messages which are virtual verbal communications are matters of evidence with regard to their meaning and its contents to be proved during trial by evidenceinchief and cross examination. The emails and WhatsApp messages will have to be read and understood cumulatively to decipher whether there was a concluded contract or not. The use of the words 'final draft' in the email dated 30.03.2018 cannot be determinative by itself. The email dated 26.02.2018 sent by the defendant at 11:46 AM had also used the same phraseology. The plaintiff was well aware from the very inception that the defendant was negotiating for sale of the lands simultaneously with two others. The plaintiff was further aware on 30.03.2018 itself that the deal with it had virtually fallen through as informed to the escrow agent. The fact that a draft MoU christened as 'finalfor discussion' was sent the same day cannot lead to the inference in isolation, of a concluded contract. There is no evidence at this stage that the acceptance was communicated to the defendant before the latter entered into a deal with defendant no.2 on 30.03.2018 and executed a registered agreement for sale on 31.03.2018. Defendant no.2 paid Rs.17.69 crores and Rs.2.20 crores towards the income tax dues of the defendant the same day, as part of the consideration amount. It is only thereafter the plaintiff purports to have communicated its acceptance to the defendant on 31.03.2018 at 01.13 PM. The prolonged negotiations between the parties reflect that matters were still at the 'embryo stage' as observed in Agriculture Produce Market Committee, Gondal and ors. vs. Girdharbhai Ramjibhai Chhaniyara and ors., (1997) 5 SCC 468. The plaintiff at this stage has failed to establish that there was a mutuality between the parties much less that they were ad idem.

18. The pleadings in the suit acknowledge the awareness of the plaintiff of the ongoing negotiations with defendant no.2. The advance of Rs.2.16 crores was refunded to

the plaintiff in the evening on 31.03.2018 by RTGS. No effort was made by the plaintiff to again remit the sum by RTGS immediately or the next day. Only a public notice was published on 03.04.2018 refuted by the defendant on 04.03.2018. The suit was then filed seven months later on 01.10.2018. The explanation that the plaintiff waited hopefully for a solution outside litigation as a prudent businessman before finally instituting the suit is too lame an excuse to merit any consideration.

19. In a matter concerning grant of injunction, apart from the existence of a prima facie case, balance of convenience, irreparable injury, the conduct of the party seeking the equitable relief of injunction is also very essential to be considered as observed in Motilal Jain (supra) holding as follows :

"6. The first ground which the High Court took note of is the delay in filing the suit. It may be apt to bear in mind the following aspects of delay which are relevant in a case of specific performance of contract for sale of immovable property:

(i) delay running beyond the period prescribed under the Limitation Act;

(ii) delay in cases where though the suit is within the period of limitation, yet:

(a) due to delay the third parties have acquired rights in the subjectmatter of the suit;

(b) in the facts and circumstances of the case, delay may give rise to plea of waiver or otherwise it will be inequitable to grant a discretionary relief."

20. The defendant no.2, in addition to the dues of the Income Tax department as aforesaid, made further payments to the defendant of Rs.25,44,57,769/ by 16.01.2019 aggregating to a total payment of Rs.45,84,71,869/. The defendants had also proceeded to utilize a sum of Rs.36.20 crores also and had therefore materially altered their position evidently by the inaction of the plaintiff to institute the suit in time and having allowed third party rights to accrue by making substantial investments. In Madamsetty (supra) it was observed :

"12.....It is not possible or desirable to lay down the circumstances under which a court can exercise its discretion against the plaintiff. But they must be such that the representation by conduct or neglect of the plaintiff is directly responsible in inducing the defendant to change his position to his prejudice or such as to bring about a situation when it would be inequitable to give him such a relief." Similar view has been expressed in Mandali Ranganna (supra).

21. We are therefore of the considered opinion that in the facts and circumstances of the present case, and the nature of the materials placed before us at this stage, whether there existed a concluded contract between the parties or not, is itself a matter for trial to be decided on basis of the evidence that may be led. If the plaintiff contended a concluded contract and/or an oral contract by inference, leaving an executed document as a mere formality, the onus lay on the plaintiff to demonstrate that the parties were ad idem having discharged their obligations as observed in Brij Mohan (supra). The plaintiff failed to do show the same on admitted facts. The draft MoU dated 30.03.2018 in Clause C contemplated payment of the income tax dues of Rs.18.64 crores as part of the consideration amount only whereafter the

agreement was to be signed relating back to the date 29.03.2008. Had this amount been already paid or remitted by the plaintiff, entirely different considerations would have arisen with regard to the requirement for execution of a written agreement remaining a mere formality. Needless to state the balance of convenience is in favour of the defendants on account of the intervening developments, without furthermore, interalia by reason of the plaintiff having waited for seven months to institute the suit. The question of irreparable harm to a party complaining of a breach of contract does not arise if other remedies are available to the party complaining of the breach. The High Court has itself observed that from the negotiations between the parties that "some rough weather was being reflected between the plaintiff and the defendant ……". The Special Civil Judge failed to address the issue of delay. The High Court noticed the arguments of the defendants with regard to delay in the institution of the suit but failed to deal with it.

22. In M.P. Mathur vs. DTC, (2006) 13 SCC 706, this Court observed :
"14. The present suit is based on equity…In the present case, the plaintiffs have sought a remedy which is discretionary. They have instituted the suit under Section 34 of the 1963 Act. The discretion which the court has to exercise is a judicial discretion. That discretion has to be exercised on well settled principles. Therefore, the court has to consider—the nature of obligation in respect of which performance is sought, circumstances under which the decision came to be made, the conduct of the parties and the effect of the court granting the decree. In such cases, the court has to look at the contract. The court has to ascertain whether there exists an element of mutuality in the contract. If there is absence of mutuality the court will not exercise discretion in favour of the plaintiffs. Even if, want of mutuality is regarded as discretionary and not as an absolute bar to specific performance, the court has to consider the entire conduct of the parties in relation to the subject matter and in case of any disqualifying circumstances the court will not grant the relief prayed for (Snell's Equity, 31st Edn., p.
366)…."

23. Wander Ltd. (supra) prescribes a rule of prudence only. Much will depend on the facts of a case. It fell for consideration again in Gujarat Bottling Co. Ltd. vs. Coca Cola Co., (1995) 5 SCC 545, observing as follows :
"47….Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest…."

13. Consequently, in view of detailed discussion made herein above, this court sees no illegality or perversity in the judgment passed by learned court below, which otherwise appears to be based on proper appreciation of the facts and law, which is accordingly upheld. Petition is dismissed. Pending applications, if any, stand disposed of. Interim directions, if any, are vacated. Record of court below be sent back forthwith. Needless to say, observations made herein above, shall not be deemed to be a reflection on the merits of the case, which shall be decided by learned court below on its own merit on the basis of evidence to be led by respective parties.

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

IFFCO TOKIO General Insurance Company Limited

..Appellant

Versus

Netar Singh and others .....Cross-objector/Respondents

FAO(MVA) No. 218 of 2014
& CO No. 13 of 2015
Decided on: October 12, 2020

Motor Vehicles Act:- Section 173- 166- Claimant suffered injuries on account of accident which occurred while he was coming back from Delhi and has suffered 70% permanent disability- Tribunal awarded claim of Rs. 12,69,250/- along with interest @ 7% p.a- award was challenged- It was observed by the Hon'ble High Court that minimum wages of unskilled worker was wrongly assesed as Rs. 7000/- by the tribunal in place of Rs. 3000/- p.m. Claimant was also found entitled for 40% increase on account of future prospects- Award modified and claim of Rs. 9,92,250/- along with 7% rate of interest per annum was awarded- Appeal disposed of.

Cases referred:
Govind Yadav vs. New India Assurance Company Limited, 2012 (1) ACJ 28;

For the appellant : Mr. Jagdish Thakur, Advocate.

For the respondents : Mr. Manoj Verma, Advocate, for respondent No.1.
Mr. Pratap Singh Goverdhan, Advocate, for respondents Nos. 2 and 3.

THROUGH VIDEO-CONFERENCING

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By way of instant appeal filed under S.173 of the Motor Vehicles Act, challenge has been laid to Award dated 14.8.2013 passed by learned Motor Accident Claims Tribunal-I, Solan,

District Solan, Himachal Pradesh in MAC Petition No. 11-S/2 of 2011, whereby learned Tribunal below, while allowing the claim petition filed under S.166 of the Act ibid by respondent No. 1 /claimant (hereinafter, 'claimant'), directed the appellant-Insurance Company to pay a sum of Rs.12,69,250/- alongwith interest at the rate of 7% per annum from the date of petition till the date of actual payment.

67. Facts, as emerge from record, are that the claimant filed a claim petition under S.166 of the Motor Vehicles Act before learned Tribunal below against respondents Nos. 2 and 3 and the appellant-Insurance Company, being owner, driver and insurer of the offending vehicle bearing registration No. HP-14A-0525, for compensation, on account of injuries suffered by him in the accident that took place on 21.10.2009. As per the claimant, on 21.10.2009, he had gone to Delhi and while returning alongwith one Anil Kumar, in the offending vehicle, which was being driven by respondent No.3 in a rash and negligent manner, suffered injuries on account of accident, near Jhirbidi Border on GT Road, Kurukshetra. Claimant was injured and removed to the hospital and matter was also reported to the Police vide Rapat No. 52, dated 23.10.2009. Though, initially first aid was given to the claimant at LNJP Hospital, Kurukshetra but subsequently, he was referred to Government Medical College and Hospital, Sector 32, Chandigarh, where he remained admitted with effect from 22.10.2009 to 2.1.2010. Claimant, in the petition averred that he had not only sustained grievous injuries in the accident but had also suffered permanent disability and had to spend more than Rs.2,50,000/- on his treatment. Besides above, claimant claimed that he was compelled to spend more than Rs.10,000/- on hiring ambulance. For having sustained grievous injuries and disability of permanent nature, claimant filed claim petition, claiming therein compensation to the tune of Rs.30.00 Lakh on account of pecuniary and non-pecuniary losses. Claimant claimed before learned Tribunal below that before the alleged accident, he was earning Rs.30,000-35,000/- per month but now on account of permanent disability suffered by him, he is unable to do regular work and as such, he is entitled to compensation from the respondents.

68. Respondents Nos. 2 and 3, by way of reply, though admitted the factum with regard to accident but claimed that wrong rapat has been registered against respondent No.2. Aforesaid respondent though admitted that the claimant was admitted to LNJP Hospital on 21.10.2009 after the accident but denied that he incurred more than Rs.2,50,000/- on his treatment. Respondents, as referred to above, admitted that the claimant was traveling in the offending vehicle on the date of alleged accident but denied that the vehicle in question was being driven rashly and negligently by respondent No.3. Respondents claimed that a truck had struck their vehicle from behind with speed, on account of which respondent No.3 lost control over the vehicle and it struck against a tree on the side of road. Lastly, aforesaid respondents averred in

their reply that since the vehicle is duly insured with appellant-Insurance Company, it is liable to indemnify the claimant as far as their liability to pay compensation, if any, to the claimant, on account of injuries suffered in the accident, is concerned.

69. Appellant-Insurance Company claimed that the offending vehicle had been registered and insured as a goods carrier vehicle and was not authorised/permitted to carry passengers or goods of general public for hire or reward. Appellant-Insurance Company further averred that since the offending vehicle was being plied in violation of the terms and conditions of the insurance policy, it is not liable to discharge the liability, if any, of respondent No. 2 i.e. owner. Besides above, appellant-Insurance Company claimed that driver of the offending vehicle was not having a valid and effective driving licence to drive the vehicle, as such, it cannot be held liable to pay the compensation on behalf of respondents Nos. 2 and 3.

70. On the basis of aforesaid pleadings of the parties, learned Tribunal below framed following issues on 19.6.2012:

> "1. Whether the accident was result of rash and negligent driving of the offending vehicle in question by respondent No.2, and the petitioner sustained injuries in that accident? OPP
> 2. If issue No.1, is proved in affirmative, whether the petitioner is entitled to compensation? If so, to what amount and from whom? OPP
> 3. Whether the petition is not maintainable? OPR-3
> 4. Whether the driver of the offending vehicle in question was not having valid and effective driving licence at the time of accident? If so, its effect?
> 5. Whether the offending vehicle did not have valid registration certificate, route permit and fitness certification at the time of accident? If so, its effect? OPR-3
> 6. Whether the vehicle in question was being plied in violation of terms and conditions of the insurance policy? OPR-3
> 7. Relief."

71. Subsequently, on the basis of pleadings and evidence adduced on record by respective parties, learned Tribunal below allowed the claim petition and held the appellant-Insurance Company liable to pay the compensation to the claimant, being insurer of the offending vehicle. In the aforesaid background, appellant-Insurance Company has approached this Court in the instant proceedings, praying therein to set aside the award being excessive. Similarly, claimant has also filed cross-objection against the impugned award for enhancement of the amount of compensation.

72. I have heard the learned counsel for the parties and perused the material available on record.

73. Mr. Jagdish Thakur, Learned Counsel appearing for the appellant, while referring to impugned award passed by learned Tribunal below, strenuously argued that the same is not

sustainable in the eyes of law being contrary to evidence on record, as such, same deserves to be quashed and set aside. Mr. Thakur contended that the learned Tribunal below has erred in answering issue No. 6 against the appellant-Insurance Company, because as per own statement of claimant, he had gone to Delhi in connection with his personal work and was coming back in the offending vehicle, which admittedly was a goods carrier, as is evident from Ext. R-2. Mr. Thakur further contended that Ext. RW-1/B, which is Registration Certificate of the vehicle in question, stands duly proved by the owner of the vehicle, which shows that the vehicle was a 'goods carriage. Mr. Thakur, referred to S.2(14) of the Act ibid, which provides that "a goods carriage means any motor vehicle constructed or adapted for use solely for the carriage of goods or any motor vehicle not so constructed or adapted when used for carriage of goods and not the passengers". Mr. Thakur further argued that if passengers are being carried in a 'goods carriage', in that eventuality, it is in violation of the policy and such passengers are to be treated as unauthorized/gratuitous passengers. With a view to prove aforesaid argument Mr. Thakur made this court peruse the statement of PW-1, who in his cross-examination, admitted that he alongwith one another person had gone to Delhi in a bus and after completion of work, was coming back in the vehicle in question, as such, it can be safely concluded that at the time of accident, neither he was owner of the goods nor was representing owner of goods as such, he was traveling in the vehicle as a gratuitous passenger, as such, learned Tribunal below ought not have fastened liability to pay the compensation upon the appellant-Insurance Company. Mr. Thakur further contended that the learned Tribunal below has erred in taking monthly income of the claimant as Rs.7,000/-, because no evidence worth credence has been led on record by the claimant that he was earning aforesaid amount per month. Mr. Thakur submitted that in the year 2009, minimum wages were Rs.3600/- per month in the State of Himachal Pradesh but, it is not understood from where figure of Rs.7,000/- has crept in. Mr. Thakur further contended that since no evidence ever came to be led on record with regard to 75% permanent disability allegedly suffered by the claimant, learned Tribunal below has erred in presuming that earning capacity of the claimant has been reduced to the extent of 75%, as such, impugned award is liable to be quashed and set aside on this ground. Mr. Thakur further contended that the learned Tribunal below has erred in awarding Rs.1,48,000/- to the petitioner on account of having remained admitted as an indoor patient for 74 days, at the rate of Rs.2,000/- per day, especially when no person, who was employed as an attendant at the rate of Rs.2,000/- per day, ever came to be examined. Mr. Thakur also argued that the learned Tribunal below has erred in awarding Rs.51,250/- on account of medicines, other treatment, special diet and loss of amenities of life and Rs. 75,000/- on account of pain and suffering Lastly Mr. Thakur contended that learned Tribunal below has erred in awarding Rs.9,45,000/- under the head,

loss of earning by taking income of the claimant as Rs.7,000/- per month. While referring to the statement of PW-1, Mr. Thakur contended that he has not uttered even a single word in this behalf and as such, learned Tribunal below without any reason has come to a conclusion, which is liable to be set aside.

74. On the other hand, Mr. Manoj Verma, learned counsel for the claimant, while supporting the award passed by learned Tribunal below contended that since it stands duly proved on record that the claimant suffered permanent disability to the extent of 75% on account of injuries suffered by him in the alleged accident, no fault, if any, could be found with the award passed by learned Tribunal below, rather it is on lower side. Mr. Verma, contended that the learned Tribunal below has failed to grant just compensation in favour of the claimant/cross—objector, as such, grave injustice has been caused to the claimant. He contended that the learned Tribunal below granted 7% interest on awarded amount, from the date of petition till actual realisation but no reason, whatsoever, has been assigned for not granting interest at the prevailing market rate i.e. 12%. He further contended that since claimant, who was 36 years of age at the time of alleged accident, had become disabled for rest of his life on account of having suffered 75% permanent disability, learned Tribunal below ought to have granted just and reasonable compensation under the head, loss of amenities of life, but in the case at hand, learned Tribunal below has awarded meager amount of Rs. 50,000/- and as such, same needs to be enhanced He also contended that the learned Tribunal below has not granted adequate compensation on account of pain, mental shock, harassment etc. to the claimant on account of injuries suffered by him in the alleged accident and as such a sum of Rs.75,000/- awarded under aforesaid head needs to be enhanced. Mr. Verma argued that learned Tribunal below erred in not awarding any compensation to the claimant on account of loss of income for the period he remained admitted in the hospital. He contended that the claimant is entitled to 100% loss of earning for minimum 74 days, period during which he remained admitted in the hospital. Lastly, Mr. Verma contended that the learned Tribunal below has erred by not considering monthly income of the claimant at the rate of Rs.30,000/- which stands duly substantiated by unrebutted testimony of PW-3 Omkar Singh.

75. Having heard learned counsel for the parties and perused grounds of appeal vis-à-vis reasoning assigned in the impugned award, this Court finds that primarily challenge in the appeal is on the quantum. Since there is no dispute inter se parties with regard to accident and injuries suffered by the claimant, in the alleged accident, there appears to be no occasion for this court to go into that aspect of the matter. Similarly, there is no dispute that the offending vehicle was insured with the appellant-Insurance Company.

76. Though, in the case at hand, Learned Counsel appearing for the appellant made a serious attempt to carve out a case that since the claimant was traveling as a gratuitous passenger in the offending vehicle, he is not entitled to compensation but no evidence to this effect ever came to be led on record and as such, learned Tribunal below, while deciding issues Nos.3 to 6 has rightly held that onus to prove these issues was on appellant-Insurance Company but they have failed to discharge said onus, as such, these issues have been rightly decided against the appellant-Insurance Company. Respondents Nos. 2 and 3 have placed on record documents Exts. R-1 to R-3, perusal whereof clearly suggests that the offending vehicle was a goods carrier and it was insured with the appellant-Insurance Company at the time of accident. Similarly, it stands duly proved on record that the driver of the offending vehicle was having a valid and effective driving licence..

77. Though, Learned Counsel appearing for the appellant, while referring to statement of PW-1 contended that since claimant himself stated in the cross-examination that he alongwith one another person had gone to Delhi in a bus and after completion of work, he was coming back in the offending vehicle, it cannot be concluded that he was traveling in the vehicle as owner of goods but said argument having been raised by Learned Counsel appearing for the appellant is wholly misconceived because, it is not in dispute that at the time of alleged accident, claimant was traveling in vehicle as owner of goods and as such, award is not liable to be interfered with on aforesaid count. However, having taken note of the fact that the claimant failed to lead any cogent and convincing evidence that he was earning Rs.30-35,000/- per month at the time of alleged accident, this Court finds substantial force in the argument of Learned Counsel appearing for the appellant that in that situation court ought to have taken into consideration minimum wages payable to skilled workers at the relevant time. As per own claim of the claimant, he prior to alleged accident was earning his livelihood from agricultural pursuits. Admittedly, material placed on record clearly suggest that the claimant though claimed before learned Tribunal below that he was earning income of Rs.30,000-35,000/- per month from agricultural pursuits but, in this regard, no cogent and convincing evidence ever came to be led on record. PW-3 Omkar Singh, person from Delhi though deposed that the claimant used to sell flowers in the year 1996-97 till the date of accident, to the tune of Rs.50-60,000/- but in this regard, he did not place on record any authentic proof. Though, learned Tribunal below, having taken note of the fact that no authentic record has been produced by the claimant, resorted to formula of minimum wages but, it is not understood that on what basis, learned Tribunal below arrived at a conclusion that at the relevant time, minimum wages of skilled/unskilled worker were Rs.7,000/- per month. During argument, Mr. Thakur, Learned Counsel appearing for the appellant made available copy of Notification dated 31.12.2008,

published in the official gazette to demonstrate that at the time of alleged accident, minimum wages payable to unskilled labour were Rs.3000/- per month.

78. Mr. Manoj Verma, learned Counsel appearing for the claimant was not able to dispute aforesaid Notification. Since at the time of accident, minimum wages of unskilled worker were Rs.3,000/- per month, learned Tribunal below erred in taking monthly income of the claimant as Rs.7,000/- in place of Rs.3,000/-, as such, impugned award is required to be interfered in this regard. Reliance is placed upon judgment rendered by Hon'ble Apex Court in **Govind Yadav** vs. **New India Assurance Company Limited**, 2012 (1) ACJ 28, wherein it has been held as under:

> "17. A brief recapitulation of the facts shows that in the petition filed by him for award of compensation, the appellant had pleaded that at the time of accident he was working as Helper and was getting salary of Rs.4,000/- per month. The Tribunal discarded his claim on the premise that no evidence was produced by him to prove the factum of employment and payment of salary by the employer. The Tribunal then proceeded to determine the amount of compensation in lieu of loss of earning by assuming the appellant's income to be Rs.15,000/- per annum. On his part, the learned Single Judge of the High Court assumed that while working as a Cleaner, the appellant may have been earning Rs.2,000/- per month and accordingly assessed the compensation under the first head. Unfortunately, both the Tribunal and the High Court overlooked that at the relevant time minimum wages payable to a worker were Rs.3,000/- per month. Therefore, in the absence of other cogent evidence, the Tribunal and the High Court should have determined the amount of compensation in lieu of loss of earning by taking the appellant's notional annual income as Rs.36,000/- and the loss of earning on account of 70% permanent disability as Rs.25,200/- per annum.
>
> The application of multiplier of 17 by the Tribunal, which was approved by the High Court will have to be treated as erroneous in view of the judgment in Sarla Verma v. Delhi Transport Corporation (2009) 6 SCC 121. In para 42 of that judgment, the Court has indicated that if the age of the victim of an accident is 24 years, then the appropriate multiplier would be 18. By applying that multiplier, we hold that the compensation payable to the appellant in lieu of the loss of earning would be Rs.4,53,600/-.

79. Reliance is also placed upon judgment rendered by this Court in **Smt. Pappi Devi and others** vs. **Kali Ram and others**, Latest HLJ 2008 (Himachal Pradesh) 1440, wherein it has been held as under:

> "6. It has come in the statement of claimant Smt. Kala Devi (PW-1) that the deceased, while working as a labourer and also selling milk was having an income of Rs.4000/- per month. Importantly, there is no cross-examination on this point at all. But the fact of the matter is that no documentary evidence has

been placed on record to prove the income. This is the only evidence with regard to income of the deceased on record.

7. It has come on record that the deceased was illiterate and working as a labourer. In my view, his income determined by the Tribunal i.e. Rs.50/- per day, is on the lower side. Taking the deceased to be employed as a daily wager, the minimum wages paid by the government in the year 2001 to the labourers was more than Rs.70/- per day. This is not disputed at the Bar. Therefore, the same can be made the basis for determining the income of the deceased. Thus, the monthly income of the deceased is determined as Rs.70 x 30 = Rs.2100/- and after deducing 1/3rd of the amount i.e. Rs.700/-, for the purpose of dependency is determined as Rs.1400/-."

80. As far as compensation under the head of loss of income, this court finds that it stands duly established on record that on account of permanent disability suffered by claimant in the alleged accident, he is unable to work in the fields. PW-4, Dr. Jagdeep, while proving disability certificate, deposed on oath that on account of 75% disability, permanent in nature, suffered by the claimant, he cannot work in the fields. Cross-examination conducted upon this witness, if is perused in its entirety, it nowhere suggests that anything contrary, to what he stated in his examination-in-chief, could be elicited from the aforesaid witness.

81. If annual income of the claimant is assessed on the basis of minimum wages, prevalent in the year 2009, income of the claimant would be Rs.3,000/- per month and for the purpose of calculating loss of income as per disability i.e. 75%, same would come to Rs.2250/- per month and thus total loss of income would be 2250 x 12 x 15=4,05,000/-.

82. Recently, Hon'ble Apex Court in **Kajal** vs. **Jagdish Chand & Ors.** Civil Appeal No. 735 of 2020, decided on 5.2.2020, has held the injured entitled not only to addition to income on account of future prospects but has also held that while awarding amount for future attendant charges, multiplier system should be used. Relevant paragraphs of the judgment (supra) are excerpted herein below:

"Loss of earnings

20. Both the courts below have held that since the girl was a young child of 12 years only notional income of Rs.15,000/ per annum can be taken into consideration. We do not think this is a proper way of assessing the future loss of income. This young girl after studying could have worked and would have earned much more than Rs.15,000/ per annum. Each case has to be decided on its own evidence but taking notional income to be Rs.15,000/ per annum is not at all justified. The appellant has placed before us material to show that the minimum wages payable to a skilled workman is Rs.4846/ per month. In our opinion this would be the minimum amount which she would have earned on

becoming a major. Adding 75% for the future prospects, it works to be Rs.6784.40/ per month, i.e., 81,412.80 per annum. Applying the multiplier of 18 it works out to Rs.14,65,430.40, which is rounded off to Rs.14,66,000/

21. Though the claimant would have been entitled to separate attendant charges for the period during which she was hospitalised, we are refraining from awarding the same because we are going to award her attendant charges for life. At the same time, we are clearly of the view that the tortfeasor cannot take benefit of the gratuitous service rendered by the family members. When this small girl was taken to PGI, Chandigarh, or was in her village, 23 family members must have accompanied her. Even if we are not paying them the attendant charges they must be paid for loss of their wages and the amount they would have spent in hospital for food etc. These family members left their work in the village to attend to this little girl in the hospital at Karnal or Chandigarh. In the hospital the claimant would have had at least two attendants, and taking the cost of each at Rs.500/ per day for 51 days, we award her Rs.51,000/.

Attendant charges

22. The attendant charges have been awarded by the High Court @ Rs.2,500/ per month for 44 years, which works out to Rs.13,20,000/. Unfortunately, this system is not a proper system. Multiplier system is used to balance out various factors. When compensation is awarded in lump sum, various factors are taken into consideration. When compensation is paid in lump sum, this Court has always followed the multiplier system. The multiplier system should be followed not only for determining the compensation on account of loss of income but also for determining the attendant charges etc. This system was recognised by this Court in Gobald Motor Service Ltd. v. R.M.K. Veluswami9. The multiplier system factors in the inflation rate, the rate of interest payable on the lump sum 9 AIR 1962 SC 1 award, the longevity of the claimant, and also other issues such as the uncertainties of life. Out of all the various alternative methods, the multiplier method has been recognised as the most realistic and reasonable method. It ensures better justice between the parties and thus results in award of 'just compensation' within the meaning of the Act.

23. It would be apposite at this stage to refer to the observation of Lord Reid in Taylor v. O'Connor:

"Damages to make good the loss of dependency over a period of years must be awarded as a lump sum and that sum is generally calculated by applying a multiplier to the amount of one year's dependency. That is a perfectly good method in the ordinary case but it conceals the fact that there are two quite separate matters involved, the present value of the series of future payments, and the discounting of that present value to allow for the fact that for one reason or another the person receiving the damages might never have enjoyed

the whole of the benefit of the dependency. It is quite unnecessary in the ordinary case to deal with these matters separately. Judges and counsel have a wealth of experience which is an adequate guide to the selection of the multiplier and any expert evidence is rightly discouraged. But in a case where the facts are special, I think, that these matters must have separate consideration if even rough justice is to be done and expert evidence may be valuable or even almost essential. The special factor in the present case is the incidence of Income Tax and, it may be, surtax."

24. This Court has reaffirmed the multiplier method in various cases like Municipal Corporation of Delhi v. Subhagwati 10 1971 AC 115 and Ors., U.P. State Road Transport Corporation and Ors. v. Trilok Chandra and Ors., Sandeep Khanduja v. Atul Dande and Ors.. This Court has also recognised that Schedule II of the Act can be used as a guide for the multiplier to be applied in each case. Keeping the claimant's age in mind, the multiplier in this case should be 18 as opposed to 44 taken by the High Court.

25. Having held so, we are clearly of the view that the basic amount taken for determining attendant charges is very much on the lower side. We must remember that this little girl is severely suffering from incontinence meaning that she does not have control over her bodily functions like passing urine and faeces. As she grows older, she will not be able to handle her periods. She requires an attendant virtually 24 hours a day. She requires an attendant who though may not be medically trained but must be capable of handling a child who is bed ridden. She would require an attendant who would ensure that she does not suffer from bed sores. The claimant has placed before us a notification of the State of Haryana of the year 2010, 11 1966 ACJ 57 12 (1996) 4 SCC 362 13 (2017) 3 SCC 351 wherein the wages for skilled labourer is Rs.4846/ per month. We, therefore, assess the cost of one attendant at Rs.5,000/ and she will require two attendants which works out to Rs.10,000/ per month, which comes to Rs.1,20,000/ per annum, and using the multiplier of 18 it works out to Rs.21,60,000/ for attendant charges for her entire life. This takes care of all the pecuniary damages.

83. Keeping in view the fact that on account of disability suffered by the claimant (75%), there would be loss of income to that extent, if we assume that the income would have increased on account of future prospects, the loss of income would also be increasing, as such, like in death case, where there is permanent loss of income, in the case of permanent disability, there is permanent loss of income, of course to the extent of disability, as such, in view of law laid down by Hon'ble Apex Court (supra), claimant is entitled to some amount on account of loss of future prospects. Since the claimant was not having a regular employment, as such, he is held entitled to 40% addition on account of loss of future prospects.

84. In view aforesaid, claimant is entitled to 40% increase on account of loss of future prospects, i.e. 40% of the total income and as such, total loss of income would be Rs.4,05,000/-

(established income) +40% of the established income i.e. Rs.1,62,000/- and thus total loss of income would be Rs.5,67,000/-.

85. It is not in dispute that the claimant remained admitted as an indoor patient for 74 days i.e. with effect from 22.10.2009 to 2.1.2010, as such, he is required to be compensated for the expenses incurred by him on medical treatment including attendant charges. In the case at hand, learned Tribunal below has awarded attendant charges at the rate of Rs.2,000/- per day, which certainly appear to be on higher side, and as such, are required to be reduced to Rs.1,000/- per day. However, taking note of the fact that claimant suffered 75% disability on account of alleged accident, a sum of Rs.1,00,000/- is required to be awarded on account of special diet and loss of amenities of life as a lump sum compensation in place of Rs.50,000/- and Rs. 2,00,000/- on account of pain, suffering, trauma,, mental shock and discomfort.

86. In view of the discussions made supra and the law laid down by Hon'ble Apex Court in the afore-cited judgments, this Court deems it fit modify the impugned award to the following extent:

Head	**Amount**
Loss of income to the extent of 75% disability	567000
Compensation for medical treatment	51250
Compensation on account of being indoor patient for 74 days including attendant charges at the rate of Rs.1000 per month	74000
Compensation on account of pain, suffering, trauma, mental shock and discomfort etc.	200000
Lump sum compensation on account of special diet and loss of amenities of life	100000
Total compensation	**992250**

87. Similarly, as per prevailing rate of interest, 7% per annum is adequate and same requires no interference.

88. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal and cross-objections are disposed of and impugned award passed by learned Tribunal below is modified to aforesaid extent only. The apportionment shall remain as determined by learned Tribunal below in the impugned award.

Pending applications, if any, are also disposed of. Interim directions, if any, are vacated.

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

Vikram Singh .....Petitioner

Versus

Vinod Kumar ...Respondent

CMPMO No. 485 of 2019
Decided on: September 29, 2020

Constitution of India, 1950- Article 227, Code of Civil Procedure, Order 39 Rule 1 & 2- Plaintiff filed a civil suit for declaration and permanent prohibitory injunction restraining defendant no.1 from raising construction, causing interference & charging the nature of suit land- Application under order 39 Rules 1 &2 CPC was dismissed by the trial court- Order was challenged before District Judge, which was dismissed – Parties feeling aggrieved approached the Hon'ble High Court – It was held that conduct of the party seeking injunction is of utmost importance – Plaintiff did not approach the court with clean hands and was having full knowledge of change in revenue entries – Grant of temporary injunction cannot be claimed as a matter of right by concealing material facts – Order/ judgment was upheld and petition disposed of. Title: Vikram Singh vs. Vinod Kumar Page-411

Cases referred:

M/S Gujarat Bottling Co.Ltd. & Ors. v. The Coca Cola Co. & Ors., AIR 1995 2372;
Mahadeo Savlaram Shelke v. The Puna Municipal Corpn., J.T. 1995(2) S.C. 504;
Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719;
Ashok Kapoor vs. Murtu Devi 2016 (1) Shim. LC 207;

For the petitioner: Mr. Pratap Singh Goverdhan, Advocate, through video-conferencing.

For the respondent: Mr. Vipan Pandit, Advocate, through video-conferencing.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant petition filed under Art. 227 of the Constitution of India is directed against judgment dated 6.6.2019 passed by learned District Judge, Sirmaur at Nahan in CMA No. 3-CMA/14 of 2019, affirming the order dated 7.12.2018 passed by learned Civil Judge, Rajgarh, District Sirmaur, Himachal Pradesh in CMA No. 135/2018 in Civil Suit No. 85/1 of 2018, whereby an application under Order XXXIX, rules 1 and 2 CPC, having been filed by petitioner-plaintiff (hereinafter, 'plaintiff') praying therein to restrain the respondent-defendant (hereinafter, 'defendant') from interfering in the land comprised of Khata Khatauni No. 215, measuring 85-40 square metre, situate in Mauja Rajgarh-II, Tehsil Rajgarh, District Sirmaur, Himachal Pradesh (hereinafter, 'suit land') either by himself, or through his agents, till disposal of the main suit, came to be dismissed.

14. For having a bird's eye view of the matter, certain undisputed facts, as emerge from pleadings adduced on record by the parties are that the plaintiff filed a suit for declaration that he and proforma defendants are co-owners-in-possession of the suit land, as well as seeking

relief of permanent prohibitory injunction restraining defendant No.1 from raising construction, changing the nature and causing interference in the suit land. Plaintiff averred in the plaint that he being resident of Village Chuni, Tehsil Rajgarh, District Sirmaur, Himachal Pradesh, is one of the shareholders of the *Shamlat* land in revenue village Rajgarh. He averred that the *Shamlat* land has been reverted back to the shareholders of *Shamlat* and as such, shareholders of *Shamlat* land have become owners, as a consequence of which, plaintiff and proforma defendant have become co-owners in possession of the suit land. Plaintiff alleged that defendant No.1 tried to cut bushes from the suit land on 1.2.2018 by employing labour and also tried to take forcible possession of the suit land and when plaintiff tried to stop him, defendant proclaimed that he has become owner of suit land. Plaintiff averred that he visited the office of Village Revenue Officer on 12.1.2018 but came to know that name of defendant NO.1 has been recorded in the column No. 5 in the revenue record, whereas, he has no right over the suit land in any manner. Plaintiff averred that in the copy of Jamabandi for the years 1987-88, land has been shown to be *Shamlat Patti Gadala Hasb Rasd Khewat* and in the column of possession same has been shown as *Maqbuza malkaan*. In the Jamabandi for the years 1992-93, Khasra number has been denoted as 653/385 measuring 0-0-2 Bigha and name of defendant No.1 has been smuggled into the revenue record in Column No.5 without any basis with collusion of the revenue staff. Alongwith said plaint, plaintiff also filed an application under Order XXXIX, rules 1 and 2 CPC praying therein to restrain defendant No.1 from causing any kind of interference in the suit land, allegedly owned and possessed by plaintiff and proforma defendant during the pendency of the civil suit.

15. Aforesaid claim put forth by the plaintiff came to be resisted by defendant No.1, who in his written statement alleged that Khasra No. 1343 and 1344 were part of old Khasra No. 385/396/96 Khata Khatauni No. 151/6, min, situate in revenue village Rajgarh. One Surat Ram son of Ishru, was in possession of 0-3 Biswa of land in Khata Khatauni No. 151/6 min, at the spot. Defendant No.1 alleged that above named Surat Ram had constructed a *Kachha* residential house on land measuring 0-3 Biswa but since he was in need of money, he sold the aforesaid land alongwith debris of *Kachha* house for a consideration of Rs.5000/- to him and in this regard a sale deed was executed by Surat Ram in his favour on 6.12.1985. Defendant No. 1 also claimed before learned court below that he filed an application for correction of revenue entries in his favour regarding 0-3 Biswa of land i.e. Case No. 32/89 and same was decided on 11.9.1989. Defendant No.1 claimed before learned Court below that all the stake holders of land in question were summoned by Assistant Collector 1st Grade, Rajgarh and in that process, one Prem Chand, who happened to father of the plaintiff, raised objection with regard to correction of revenue entries but subsequently, matter was compromised inter se

defendant No.1 and Prem Chand and in the settlement, it was agreed inter se parties that out of 0-3 Biswa of land, land to the extent of 0-2 Biswa shall be occupied by defendant No.1 as owner-in-possession whereas, remaining 0-1 Biswa land will be occupied by Prem Chand, as owner-in-possession. Defendant No.1 claimed before learned court below that on the basis of aforesaid settlement inter se Prem Chand, father of plaintiff, order was passed by Assistant Collector 1st Grade on 19.9.1999, whereafter, land measuring 0-2 Biswa occupied by defendant No.1 came to be depicted as Khasra No. 653/385/96/1, whereas, 0-1 Biswa of land owned and possessed by Prem Chand, was depicted as Khasra No. 653/385/96/1 in the Tatima. In the aforesaid background, defendant claimed before learned court below that on account of correction ordered by Assistant Collector 1st Grade, Rajgarh, Khasra No. 653/385/96/1 measuring 0-2 Biswa has been shown as Khasra No. 1344 and Khasra No. 653/385/96/2 measuring 0-1 Biswa shown as Khasra No. 1343. Lastly, defendant No.1 claimed before learned court below that the suit at hand has been filed by the plaintiff in collusion with his father, Prem Chand, with a view to grab land of the defendant No.1, as the same is a valuable land and falls in the jurisdiction of Nagar Panchayat area, Rajgarh.

16. On the basis of aforesaid pleadings adduced on record by respective parties, learned Civil Judge (Senior Division), Rajgarh, vide order dated 7.12.2018, declined the prayer made on behalf of the plaintiff to restrain defendant No.1 from raising any sort of construction on the suit land.

17. Being aggrieved and dissatisfied with the aforesaid order passed by learned Senior Civil Judge, Rajgarh, plaintiff filed an appeal before learned District Judge, Sirmaur at Nahan, which also came to be dismissed vide order judgment dated 6.6.2019. In the aforesaid background, plaintiff has approached this Court in the instant proceedings, praying there to set aside aforesaid judgment and order passed by learned Courts below.

18. I have heard the learned counsel for the parties and perused the material available on record.

19. It is well settled law that before grant of injunction, a court is required to satisfy itself that the party praying for the relief has a prima facie case and balance of convenience is also in its favour. Besides above, while granting injunction, court is also required to consider whether refusal to grant injunction would cause irreparable loss/injury to such party. While deciding balance of convenience, court is also required to weigh protection of the plaintiff's right against need for protection of defendant's right or infringement of right. Apart from aforesaid well established parameters/ingredients, conduct of the party seeking injunction is also of utmost important, as has been held by Hon'ble Apex Court in case **M/S Gujarat Bottling**

Co.Ltd. & Ors. v. **The Coca Cola Co. & Ors.,** AIR 1995 2372. In case a party seeking injunction fails to make out any of the three ingredients, it would not be entitled to injunction. Hon'ble Apex Court in case **Mahadeo Savlaram Shelke** v. **The Puna Municipal Corpn.,** J.T. 1995(2) S.C. 504 relying upon its earlier judgment in **Dalpat Kumar** v. **Prahlad Singh**, (1992) 1 SCC 719 has aptly interpreted phrases, "prima facie case", "balance of convenience" and "irreparable loss". Hon'ble Apex Court has observed in the judgment (supra) that the phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of justice. The court would be circumspect before granting the injunction and look to the conduct of the party, the probable injury to either party and whether the plaintiff could be adequately compensated if injunction is refused. The existence of prima facie right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury but means only that the Injury must be a material one, namely one that cannot be adequately compensated by way of damages. The balance of convenience must be in favour of granting injunction. The court while granting or refusing injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued.

20. A Coordinate Bench of this Court in **Ashok Kapoor** vs. **Murtu Devi** 2016 (1) Shim. LC 207, had an occasion to deal with the issue of injunction, wherein it, having taken note of various judgments rendered by Constitutional courts, concluded as under:

> "47. The discretion of the Court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff:-
>
> (i) existence of a prima facie case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction;

(ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's right or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and

(iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted.

In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the Court with clean hands."

21. Having heard learned counsel for the parties and perused material available on record, this court finds that the plaintiff while claiming defendant No.1 to be stranger to the suit land has placed reliance upon Jamabandi for the years 1987-88, wherein suit land has been shown to be *Shamlat Patti Gadala hasb rasd khewat* and in the column of possession it is recorded as *maqbooza malkaan*, whereas, defendant No. 1 has claimed himself to be in possession of suit land as a purchaser from one Surat Ram. Pleadings available on record clearly suggest that there is no dispute inter se parties that one Surat Ram son of Ishru was in possession of 0-3 Biswa land comprised in Khata Khatauni No. 151/106 and Surat Ram had constructed a *Kachha* residential house over aforesaid piece of land. Judgment/order impugned before this Court clearly reveals that the suit land stands described as *Shamlat patti hasb rasd Khewat* in the revenue record and same has been shown to be in possession of *maqbuza malkaan*. Though the plaintiff has disputed the entries made in favour of defendant No.1 by claiming before learned court below that revenue entries have been made *dehors* the actual position on the spot without following due procedure. Plaintiff claimed that the factum with regard to change in the revenue entries came into his knowledge in February, 2018, whereas, defendant No.1 in his written statement has categorically stated that after execution of sale deed dated 6.12.1985, he had applied for correction of revenue record and in that process, Assistant Collector, 1st Grade in case titled Vinod Kumar vs. Surat Ram etc. sought objections from all stake holders. None of the stakeholders save and except one Shri Prem Chand, who happened to be father of the plaintiff had objection to the prayer made on behalf of the defendant No.1 for correction of revenue record. Though above named Prem Chand claimed himself to be in possession of Khasra No. 653/385/96 but Assistant Collector, 1st Grade, after having visited the spot, found defendant No.1 to be in possession of 2 Biswa of aforesaid land and accordingly said area came to be depicted as Khasra No. 653/385/96/1. Prem Chand, father of the plaintiff was put in possession of 1 Biswa of aforesaid Khasra number and accordingly, that portion was depicted as Khasra No. 653/385/96/2. On the basis of aforesaid spot visit by Assistant Collector, 1st Grade, revenue entries were changed and as such, it

cannot be said that change in the revenue record was without any basis, rather, same was done by Assistant Collector, 1st Grade in accordance with law. Otherwise also, plaintiff has nowhere disputed that at present Khasra No. 653/385/96/1 measuring 02 Biswa now stands shown as Khasra No. 1344, whereas, Khasra No. 653/385/96/2 measuring 1 Biswa has been depicted as 1343. Plaintiff has not been able to dispute that Prem Chand whose possession was recorded in Khasra No. 653/385/96/1 is none other than his father, because such assertion made by defendant No.1 in his written statement has been nowhere denied by the plaintiff in rejoinder. Defendant No. 1 in his reply has specifically averred regarding correction of revenue entries pursuant to order passed by Assistant Collector, 1st Grade, Rajgarh, but interestingly, such assertion has been nowhere denied/disputed by the plaintiff in the replication/rejoinder, as such, there appears to be considerable force in the submission made by defendant No.1 that the plaintiff has field suit in collusion with his father, with a view to grab land of defendant No.1, which otherwise stands recorded in his name in the revenue record. Having carefully considered the aforesaid aspect of the matter, this Court finds that the plaintiff has not approached the court with clean hands rather, with a view to succeed, has made an attempt to mislead the Court by twisting facts. Since there is no dispute that Prem Chand is father of the plaintiff, it can be safely inferred/concluded that he was in full knowledge of changes made in revenue record and his claim of becoming aware of revenue entries in favour of defendant No.1 on 1.2.2018 stands falsified. Similarly, allegation of the plaintiff that defendant No.1 is stranger to suit land and he is being forcibly dispossessed of the suit land, has been rightly brushed aside by learned courts below, while considering prayer for issuance of restraint order against the defendant No.1, who has successfully proved on record that he has become owner-in-possession of suit land on the basis of correction made in the revenue record by the order of Assistant Collector, 1st Grade. No material worth credence has been placed on record that at any point of time, aforesaid order passed by Assistant Collector, 1st Grade ever came to be laid challenge in competent court of law, as such, same has attained finality.

22. As has been noticed in earlier part of judgment, conduct of party seeking injunction is of utmost importance besides other basic principles namely prima facie case, balance of convenience and irreparable injuries. Though, in the case at hand, having carefully perused the record, this Court finds that none of basic ingredients as have been taken note above, exists in favour of the plaintiff but, even otherwise, he is not entitled to discretionary relief on account of his conduct. Person seeking injunction must approach court with clean hands. It is settled by now that he who seeks equity must do equity. In the present case, plaintiff, who had definite knowledge that his father was recorded as owner over 1 Biswa of land (old Khasra No.

653/385/96), made an attempt to procure restrain order from the court by concealing material facts, as such, learned courts below rightly rejected his application.

23. It is equally settled by now that grant of temporary injunction cannot be claimed by a party as a matter of right nor can it be denied by a court arbitrarily, rather, discretion in this regard is to be exercised by a court, on the basis of principles as have been enunciated in the various judgments passed by Constitutional courts. A party seeking relief is not only required to establish prima facie case but also irreparable injury, which may be caused to it in case of denial of grant of relief. Once in the case at hand, it stands prima facie established that the defendant No. 1 is in possession of land and in this regard change in the revenue record was made after following due process of law, learned courts below rightly rejected the application.

24. Consequently, in view of above, judgment and order passed by learned Court below are upheld. The petition at hand stands dismissed alongwith all pending applications.

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

Gursharn Singh ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 1014 of 2020
Decided on October 8, 2020

Code of Civil Procedure, 1908- Section 439- FIR under section 376, 366, 302 of IPC was registered against petitioner – Approached for regular bail before the Hon'ble High Court- Victim was major at the time of offence and both were well known to each other – Bail petitioner already suffered for two years – Investigation in complete hence no justification to curtail his freedom from indefinite period – Normal rule is of bail not jail. Petition allowed subject to conditions and furnishing bail bonds along with surety.

Cases referred:

Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49;
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496;

For the petitioner — Mr. N.S. Chandel, Senior Advocate with Mr. Vinod Gupta, Advocate.

For the respondent — Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General, through video-conferencing.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Bail petitioner, Gursharn Singh, who is behind bars since 29.6.2018, has approached this Court in the instant proceedings filed under S.439 CrPC for grant of regular bail in FIR No. 111, dated 29.6.2018 registered at Police Station Dehra, District Kangra, Himachal Pradesh under Ss.376, 366 and 302 IPC. Status report filed on behalf of the respondent-State reveals that on 28.6.2018, Police after having received a telephonic information from the owner of Saurabh Hotel, Chintpurni that a girl staying in Room No. 423 in the said hotel alongwith bail petitioner, has expired on account of illness. Police visited the hospital at Chintpurni and sent the body of deceased girl to Dr. Rajinder Prasad Government Medical College, Tanda for post-mortem. Besides above, police also informed parents of the deceased and subsequently on the basis of statement made by mother of the deceased girl, arrested the bail petitioner. Complainant, Balbir Kaur, mother of the deceased girl, who reached Chintpurni, after having received information from the Police, got her statement recorded under S.154 CrPC, alleging that her daughter was studying in second year in college and had gone to Fagwara (Punjab) to attend NCC camp. Complainant alleged that her daughter was at Fagwara for NCC camp with effect from 19.6.2018 to 28.6.2018. She alleged that on 28.6.2018, she had enquired about the well being of her daughter, who had come in the contact of the bail petitioner at Dhir Hospital Banga, while the complainant was admitted there. Complainant alleged that her deceased daughter had disclosed to her before going to Fagwara that the bail petitioner extends threats to her on phone. She alleged that the bail petitioner took her daughter to Chintpurni on 28.6.2018 by exercising coercion, where he forcibly sexually assaulted the deceased against her wishes, as a consequence of which, she died. Complainant further alleged that the bail petitioner administered some medicine to her daughter forcibly, while committing forcible sexual intercourse with her, as a consequence of which, her daughter died, as such, appropriate action in accordance with law be taken against him. In the aforesaid background, FIR detailed herein above, came to be lodged against the bail petitioner on 29.6.2018 and since then, he is behind the bars.

2. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while fairly admitting the 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 the offence alleged to have been committed by him, he does not deserve any leniency. Mr. Bhatnagar, while making this Court peruse the record, contends that there is overwhelming evidence collected on record by the investigating agency to the effect that the bail petitioner firstly taking undue advantage of innocence of the deceased victim, made her elope with him and then sexually assaulted her against her wishes in a hotel at Chintpurni. Mr. Bhatnagar further submits that the victim died on account of reaction of the medicine, which the bail

petitioner applied on her private parts, while committing forcible sexual intercourse with the deceased, as such, he has been rightly booked under S.302 IPC besides S.376 IPC. Lastly, Mr. Bhatnagar, while referring to the status report filed by the police, contends that prior to the alleged incident, bail petitioner had made similar attempt with 2-3 other girls, as such, having taken note of his antecedents, the bail petitioner does not deserve any leniency.

3. Having heard learned counsel for the parties and perused the material available on record, this Court finds that as per own statement of the complainant (mother of deceased), bail petitioner had prior acquaintance with the deceased and they had been talking to each other on phone. It has also emerged during investigation that prior to alleged incident, bail petitioner had taken the deceased to some other city in Punjab, where though he had made an attempt to have sexual intercourse with the deceased but since the girl was a virgin, petitioner could not succeed in his attempt. It is not in dispute that on 29.6.2018 deceased, who was major at that time, went to Chintpurni, District Una, Himachal Pradesh alongwith bail petitioner on his bike, where both hired room in Hotel Saurabh. Record of the hotel collected by the investigating agency clearly suggests that names of both, bail petitioner and the deceased girl were entered in the register, before their stay in the hotel. Besides above, one Virender Singh, who had given room to the bail petitioner and deceased, nowhere stated that the deceased was taken in the room by the bail petitioner against her wishes, rather, he in his statement has stated that after taking room, both went inside the room and locked themselves inside the room. Similarly, there is nothing in his statement, from where it can be inferred that the deceased before alleged assault, raised any hue and cry, rather, as per statement of Virender Singh, bail petitioner came down to inform that the deceased was not feeling well and as such, she was taken to hospital where she unfortunately expired. Having taken note of the fact that the deceased was major at the relevant time and she, of her own volition, had gone to Chintpurni with the bail petitioner, this Court does not find any force in the claim of investigating agency that the deceased was coerced by the petitioner to accompany him to Chintpurni. Story coined by the investigating agency with regard to coercion does not appear to be plausible, especially on account of statement of employee of the hotel, who had entered names of the bail petitioner and deceased in the register while giving them room on rent. Rather, having taken note of the fact that the girl had prior acquaintance with the bail petitioner and at earlier point of time, she had visited some city in Punjab with the bail petitioner, this court is inclined to agree with learned senior counsel for the bail petitioner that the deceased, of her own volition, had gone to Chintpurni with the bail petitioner. Similarly, this Court having perused post mortem report finds that the victim died on account of reaction of medicine i.e. "*Lignocaine"* gel applied by bail petitioner on the private parts of the deceased. As per post

mortem report, cause of death in the case is "*lignocaine Hydrochloride toxicity likely due to its absorption from vaginal mucosa and hymnal tear.*" Learned senior counsel for the petitioner states that the gel used by bail petitioner is a local anaesthesia frequently used during medical procedures and as such, same cannot be said to be injurious, but, whether the gel could be used during sexual intercourse with a view to relieve the pain, is a question, which is of great significance in the present case. Mr. Chandel, learned senior counsel, while making this Court peruse the literature i.e. "Bailey & Love's Short Practice Of Surgery" (26th Edition)(CRC Press), made a serious attempt to persuade this Court to agree with his contention that the gel allegedly used by bail petitioner during alleged sexual intercourse upon the deceased, is commonly used during medical procedures in males and females alike. To buttress his argument, Mr. Chandel, made this Court to read following excerpt from the above literature (available at page 1313 of the book):

> **"Urethral catheterisation**
> "Following a thorough hand wash, sterile gloves are donned. The genitalia are cleaned using soapy antiseptic. Lignocaine gel is inserted into the urethra, warning the patient that this may create stinging. The jelly should be massaged posteriorly in an attempt to anaesthetise the sphincter region, and it is of advantage to place a penile clamp for several minutes. A small Foley catheter should be passed while the penis is held taut. In a female patient, the labia should be parted using the middle and index fingers of the left hand, which should not be moved once cleaning has been performed. Providing a stricture is not the cause, the catheter should pass freely. Once urine begins to drain, it is wise to pass a few more centimetres of catheter into the bladder before the balloon is inflated to avoid inflation in the prostate. Force must not be used (Summary box 76.4)"

4. Having perused the above literature, this Court finds that *Lignocaine* gel is applied on internal parts of human body like urethra/penis while inserting catheter to reduce pain, as such, it cannot be said that the gel allegedly used by bail petitioner was totally unsafe to be applied on the private parts of the deceased.

5. At this stage, learned Additional Advocate General contends that though it is yet to be proved in accordance with law that the bail petitioner was aware of adverse effects of the gel, allegedly used by him during sexual intercourse but, even otherwise, there is nothing to infer that the bail petitioner applied the gel with the consent of the girl. But, having noticed conduct of the victim/deceased, which reflects from her consent to visit Chintpurni alongwith bail petitioner on his bike, coupled with the fact that she was major at the time of alleged incident, this Court is not inclined to agree with the aforesaid submission made by learned Additional Advocate General. Deceased and bail petitioner hired a room in hotel at Chintpurni, Himachal Pradesh, which is few hundred miles from their native place in Punjab and as such, it can be safely presumed that the bail petitioner applied gel in question in good faith to relieve

pain of the deceased, who at the time of alleged incident was a virgin and if it is so, bail petitioner is entitled to have benefit of provisions of S.88 IPC, which provides as under:

> "88. Act not intended to cause death, done by consent in good faith for person's benefit.—Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm. Illustration A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death and intending in good faith, Z's benefit performs that operation on Z, with Z's consent. A has committed no offence."

6. While referring to the status report, learned Additional Advocate General on previous date had argued that since it stands established on record that the bail petitioner was working as a Pharmacist at Dhir Hospital, Banga, it can be safely concluded that he was aware of the adverse impact/side effects of the Lignocaine gel, used by him. This court, with a view to ascertain the aforesaid claim of learned Additional Advocate General, specifically directed Station House Officer, Police Station Dehra, District Kangra, to verify that in what capacity bail petitioner was working at Dhir Hospital, Banga, prior to the alleged incident. Vide communication dated 24.9.2020, Dhir Hospital, Banga has apprised the police that prior to the alleged incident, bail petitioner was working as a Ward Attendant and he is an under matriculate, as such, it cannot be concluded at this stage that the bail petitioner was aware of the side effects of the gel used by him, but despite still he, with a view to cause harm/injury to the deceased, applied the same on her private parts against her wishes.

7. Besides above the victim was major at the time of alleged offence and as such, it cannot be said that she was not aware of consequences of her being in the company of the bail petitioner, rather she, being an educated and major girl, it cannot be said that she was allured by the bail petitioner to visit Chintpurni with him. Besides this, bail petitioner and victim were well known to each other and as such, it cannot be said that the bail petitioner taking undue advantage of her innocence made her elope with him and committed forcible sexual intercourse with the deceased against her wishes.

8. Though, aforesaid aspects of the matter are to be considered and decided by the learned trial Court in the totality of evidence collected on record by the investigating agency but having taken note of aforesaid glaring aspects of the matter, this Court sees no reason to let bail petitioner incarcerate in jail for an indefinite period during trial, especially when he has already suffered for more than two years. Though *Challan* in the case stands filed but only eight prosecution witnesses have been examined, and as such, considerable time is likely to be

consumed for conclusion of trial, which otherwise is likely to be further delayed in the wake of Covid-19 pandemic. Since investigation in the case is complete and nothing remains to be recovered from the bail petitioner, there is no justification to curtail his freedom for an indefinite period during trial. No material worth credence has been placed on record suggestive of the fact that in the event of being enlarged on bail, bail petitioner may flee from justice or may prejudice investigation/prosecution. However, 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

9. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
>
> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
>
> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a

charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

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

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

12. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496, has laid down the various principles to be kept in mind, while

deciding petition for bail i.e. prima facie case against the accused, nature and gravity of offence, severity of punishment, likelihood of repeating of the offence by accused etc.

13. In view of above, bail petitioner has carved out a case for himself. Consequently, present petition is allowed. Bail petitioner is ordered to be enlarged on bail, subject to furnishing bail bonds in the sum of Rs.1,00,000/- with one local surety in the like amount, to the satisfaction of the Magistrate available at the station, besides the following conditions:

(e) 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;

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

(g) 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

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

(i) He shall surrender passport, if any, held by him.

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 petition alone.

The petition stands accordingly disposed of.

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

Vijay Kumari ...Petitioner

Versus

State of Himachal Pradesh and others ...Respondents

CWPOA No. 1502 of 2019

Decided on October 12, 2020

Constitution of India, 1950- Article 226- Petitioner working as steno-Typist prayed that her entire service w.e.f. 27.2.1987 may be considered for seniority and pension and to grant her pension under old scheme after her superannuation – Held, that the petitioner did not take up the issue of her assignment to DRDA- Continued work till her merger in Rural Development Department – Petition hit by delay and laches as cause of action arose in 1987 and petition was filed after 26 years i.e. in the year 2013- Petition dismissed being hopelessly barred by time.

Cases referred:

B.S. Bajwa and another vs. State of Punjab and others, (1998)2 SCC 523;

State of Uttar Pradesh and others vs. Arvind Kumar Srivastava and others, 2014 AIR SCW 6519;

Banda Development Authority, Banda vs. Moti Lal Agarwl and Ors., 2011 AIR SCW 2835;

Chennai Metropolitan Water Supply and Sewerage Board and others vs. T.T. Murali Babu, 2014 AIR SCW 1171;

For the petitioner	Mr. Praveen Chandel, Advocate.
For the respondent	Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General.

THROUGH VIDEO-CONFERENCING

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Petitioner was recommended for appointment with the District Rural Development Agency, Bilaspur against the post of Steno-typist by Himachal Pradesh Public Service Commission in a selection process undertaken by it in the year 1986 for filling up regular posts of Steno-typists in various Departments of State of Himachal Pradesh, through direct recruitment. Pursuant to her selection as a Steno-typist, petitioner was assigned to District Rural Development Agency, Bilaspur. Though the petitioner has claimed that her aforesaid assignment to the District Rural Development Agency is not on the basis of any specific criteria, rather same was on the basis of pick and choose method adopted by the Public Service Commission, but since, no challenge, if any, to the aforesaid method adopted by Public Service Commission ever `came to be laid, as such, it has lost its relevance, as far as present proceedings are concerned. Petitioner has averred in the petition that at the time of her aforesaid appointment, she genuinely believed that pursuant to her selection as a Steno-typist against regular post advertised by Himachal Pradesh Public Service Commission, she would be sent to State Department and she will have the benefits at par with others selected in the selection process. She has averred that the requisition, Annexure P-2 sent by the DRDA was not in her knowledge at the time of appointment but, as has been observed herein above, since the petitioner, pursuant to her aforesaid selection, accepted her appointment in the office of DRDA, Bilaspur and thereafter continued to work in the same organisation till the time of merger of

DRDA borne staff in the Rural Development Department, it is not open for her to rake up the aforesaid issue at this belated stage. Staff of Rural Development Agency in the State was merged with the Rural Development Department, whereby services of the petitioner also came to be merged with the said Department vide communication dated 29.9.2012 (Annexure P-10). It clearly emerges from the record that vide Notification dated 28.9.2012 (Annexure P-11) DRDA borne staff was merged on permanent basis in the Rural Development Department and as per said Notification officials so merged are/were to be placed at the bottom of the respective grade/cadre and their seniority was to be determined on the basis of their merger whereas, pensionary benefits are/were to be regulated as per instructions of the State Government issued vide FD's letter No. Fin(Pen)A(3)-1/96 dated 15.5.2003 and as per provisions of HP Civil services Contributory Pension Rules, 2006. It stands specifically mentioned in the instructions dated 28.9.2012 (Annexure P-11) that after merger, only those officials, who were entitled to regular pay scale shall fall under the provisions of new pension scheme. besides above, options of the officials were also called accepting terms and conditions, from all the concerned employees and petitioner also consented for the same as is evident from Annexure R-1 annexed with the reply filed by respondents Nos. 1 to 3.

16. Now, the precise prayer as has been made in the instant petition by the petitioner is that her entire service with effect from 27.2.1987 may be taken into consideration for seniority and pension alongwith consequential benefits and she be held entitled to pension under old scheme after her superannuation.

17. Having heard learned counsel for the parties and perused the material available on record, this Court finds that though in the year 1986, petitioner participated in the selection process undertaken by the Himachal Pradesh Public Service Commission for filling up regular posts of Steno-typists in various Departments of the State through direct recruitment but, it is also a matter of fact that the petitioner, after having been selected, was assigned to District Rural Development Agency, Bilaspur. Petitioner happily accepted the job in the year 1987 as is evident from Annexure P-3 and thereafter, at no point of time, raked up the issue with regard to her wrong assignment to DRDA, where she continued to work uninterruptedly without break, till her merger in the Rural Development Department vide Notification dated 29.9.2012. Perusal of aforesaid office order dated 29.9.2012 clearly reveal that DRDA borne staff was ordered to be merged on permanent basis in Rural Development Department as per terms and conditions contained in the aforesaid Notification, which specifically provides that the DRDA borne staff shall be placed at the bottom of their respective cadre/grade and their seniority shall be fixed on the basis of merger and pensionary benefits shall regulated as per Notification dated 15.5.2003

and as per provisions of Himachal Pradesh Civil Services Contributory Pension Scheme issued vide Notification dated 17.8.2006.

18. Careful perusal of Annexure R-1 (supra) placed on record, clearly reveals that the petitioner specifically opted for taking over of her services in Rural Development Department on the terms and conditions contained in the Notification dated 29.9.2012 and as such, now it is not open for her to claim that the services rendered by her with effect from 27.2.1987 may be counted towards seniority and pension. It is not in dispute that earlier services rendered by the petitioner with DRDA were governed by Bye-laws of DRDA, which is a society registered under Societies Registration Act, 1860 and as per these Rules, there is no provision of pension to the employees engaged purely on temporary basis with DRDA.

19. This is an admitted fact that the DRDA, Bilaspur, sent a requisition to the Himachal Pradesh Public Service Commission on 23.12.1986 thereby requisitioning one post of Hindi Steno-typist and in the requisition, under Clause 5, it has been mentioned that the post is non-pensionable. Pursuant to that requisition, petitioner, who had qualified the selection process, was sponsored to the DRDA, for appointment on 5.2.1987. The DRDA, vide office order dated 21.2.1987, offered appointment to the petitioner, which was duly accepted by her. Even while submitting option in the year 2012, at the time of taking over of her services from DRDA Bilaspur by Rural Development Department, petitioner has bound herself by the terms and conditions issued vide Notification dated 24.9.2012 and letter dated 28.9.2012, both of which provide for new pension scheme only. Having accepted appointment in the year 1987 in the DRDA, the terms and conditions imposed at the time of taking over of her services in the Rural Development Department, now it is not open for the petitioner to take a U turn and lay challenge to her appointment made in the year 1987 in the District Rural Development Agency or claim benefit of past service rendered since 1987 till 2012 for the purpose of seniority and pension.

20. Besides this, the petition at hand is hit by delay and laches. Admittedly the cause of action arose in favour of the petitioner in the year 1987 when she was sponsored by the Public Service Commission to the DRDA and as such, petition, if any, against said cause ought to have been filed immediately or within a reasonable period thereafter. But the petitioner has chosen to file the petition after around 26 years i.e. in the year 2013, for which no explanation has been rendered by the petitioner.

21. By now, it is well settled that relief cannot be extended to the persons who have approached the court after a long delay, especially who approach the court after inordinate delay. Reliance is placed on **B.S. Bajwa and another** vs. **State of Punjab and others**, (1998)2 SCC 523, wherein the Hon'ble Apex Court has held as under:-

> "7. Having heard both sides we are satisfied that the writ petition was wrongly entertained and allowed by the single Judge and, therefore, the Judgments of the single Judge and the Division Bench have both to be set aside. The undisputed facts appearing from the record are alone sufficient to dismiss the writ petition on the ground of laches because the grievance made by B. S. Bajwa and B. D. Kapoor only in 1984, which was long after they had entered the department in 1971-72. During this entire period of more than a decade they were all along treated as junior to the other aforesaid persons and the rights inter se had crystallised which ought not to have been re-opened after the lapse of such a long period. At every stage the others were promoted before B. S. Bajwa and B. D. Kapoor and this position was known to B. S. Bajwa and B. D. Kapoor right from the beginning as found by the Division Bench itself. It is well settled that in service matters the question of seniority should not be re-opened in such situations after the lapse of a reasonable period because that results in disturbing the settled position which is not justifiable. There was inordinate delay in the present case for making such a grievance. This alone was sufficient to decline interference under Article 226 and to reject the writ petition."

22. The Hon'ble Apex Court in case titled as **State of Uttar Pradesh and others** vs. **Arvind Kumar Srivastava and others**, 2014 AIR SCW 6519, held that relief cannot be extended to the persons who have approached the Court after long delay, that too, who are fence-sitters. It is apt to reproduce para 24 of the judgment herein:

> "24. Viewed from this angle, in the present case, we find that the selection process took place in the year 1986. Appointment orders were issued in the year 1987, but were also cancelled vide orders dated June 22, 1987. The respondents before us did not challenge these cancellation orders till the year 1996, i.e. for a period of 9 years. It means that they had accepted the cancellation of their appointments. They woke up in the year 1996 only after finding that some other persons whose appointment orders were also cancelled got the relief. By that time, nine years had passed. The earlier judgment had granted the relief to the parties before the Court. It would also be pertinent to highlight that these respondents have not joined the service nor working like the employees who succeeded in earlier case before the Tribunal. As of today, 27 years have passed after the issuance of cancellation orders. Therefore, not only there was unexplained delay and laches in filing the claim petition after period of 9 years, it would be totally unjust to direct the appointment to give them the appointment as of today, i.e. after a period of 27 years when most of these respondents would be almost 50 years of age or above."

23. Even Division Bench of this Court, while placing reliance upon the aforesaid judgments passed by Hon'ble Apex Court, has held in LPA No.604 of 2011, titled **Karan Singh Pathania** vs. **State of H.P. and Others** that "fencer cannot be held entitled to any relief"

24. In **I. Chuba Jamir & Ors.** versus **State of Nagaland & Ors.,** reported in 2009 AIR SCW 5162, the Apex Court has held that the inordinate delay is a very valid and important consideration. It is apt to reproduce para 17 of the judgment herein:

> "17. On a careful consideration of the materials on record and the submissions made by Mr. Goswami we are unable to accept the claims of the appellants-writ petitioners. In our view the inordinate delay of 7 or 8 years by the appellants-writ petitioners in approaching the High Court was a very valid and important consideration. This aspect of the matter was also brought to the notice of the Single Judge but he proceeded with the matter without saying anything on that issue, one way or the other. It was, therefore, perfectly open to the Division Bench to take into consideration the conduct of the appellants-writ petitioners and the consequences, apart from the legality and validity, of the reliefs granted to them by the learned single Judge."

25. In **Banda Development Authority, Banda** vs. **Moti Lal Agarwl and Ors.**, 2011 AIR SCW 2835, similar principle has enunciated by Hon'ble Apex Court, wherein it has been held as under:

> 15. In our view, even if the objection of delay and laches had not been raised in the affidavits filed on behalf of the BDA and the State Government, the High Court was duty bound to take cognizance of the long time gap of 9 years between the issue of declaration under Section 6(1) and filing of the writ petition and declined relief to respondent No.1 on the ground that he was guilty of laches because the acquired land had been utilized for implementing the residential scheme and third party rights had been created.
>
> The unexplained delay of about six years between the passing of award and filing of writ petition was also sufficient for refusing to entertain the prayer made in the writ petition.
>
> xxx xxxx xxx
>
> 25. In this case, the acquired land was utilized for implementing Tulsi Nagar Residential Scheme inasmuch as after carrying out necessary development i.e. construction of roads, laying electricity, water and sewer lines etc. the BDA carved out plots, constructed flats for economically weaker sections and lower income group, invited applications for allotment of the plots and flats from general as well as reserved categories and allotted the same to eligible persons. In the process, the BDA not only incurred huge expenditure but also created third party rights. In this scenario, the delay of nine years from the date of publication of the declaration issued under Section 6(1) and almost six years

from the date of passing of award should have been treated by the High Court as more than sufficient for denying equitable relief to respondent No.1."

26. Hon'ble Apex Court in **Chennai Metropolitan Water Supply and Sewerage Board and others** vs. **T.T. Murali Babu**, 2014 AIR SCW 1171, has held that the doctrine of delay and laches should not be lightly brushed aside. Hon'ble Apex Court has held as under:

"16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the Court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the Court. Delay reflects inactivity and inaction on the part of a litigant – a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis. In the case at hand, though there has been four years' delay in approaching the court, yet the writ court chose not to address the same. It is the duty of the court to scrutinize whether such enormous delay is to be ignored without any justification. That apart, in the present case, such belated approach gains more significance as the respondent-employee being absolutely careless to his duty and nurturing a lackadaisical attitude to the responsibility had remained unauthorisedly absent on the pretext of some kind of ill health. We repeat at the cost of repetition that remaining innocuously oblivious to such delay does not foster the cause of justice. On the contrary, it brings in injustice, for it is likely to affect others. Such delay may have impact on others' ripened rights and may unnecessarily drag others into litigation which in acceptable realm of probability, may have been treated to have attained finality. A court is not expected to give indulgence to such indolent persons - who compete with 'Kumbhakarna' or for that matter 'Rip Van Winkle'. In our considered opinion, such delay does not deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold."

27. Besides this, learned Counsel appearing for the petitioner has also stated that the case of his client is squarely covered by judgment rendered by this Court in CWP No. 1802 of 2002, State of Himachal Pradesh & others vs. Mr. Basheshar Lal (decided on 31.7.208), whereby this Court has upheld decision of Himachal Pradesh Administrative Tribunal rendered in OA(D) No. 283 of 1996 decided on 8.5.2002, whereby benefit of past service was given to the

petitioners, therein, who were initially appointed under Panchayat Samitis and later on absorbed in Panchayati Raj Department. However, in that case, the concerned persons stood absorbed in the Department in the year 1978, when there was provision of pension, but in the case at hand, petitioner has been absorbed in the Rural Department in the year 2012 i.e. nine years after the old pension scheme was given up on 15.5.2003, as such, petitioner cannot claim benefit of pension, which is not available to anyone in the State of Himachal Pradesh after 15.5.2003. As such, plea of learned Counsel appearing for the petitioner that the case of petitioner is squarely covered by judgment (supra), does not hold ground and is rejected.

28. Learned Counsel appearing for the petitioner has also placed reliance upon a judgment rendered by Hon'ble Supreme Court of India in Civil Appeal no. 3984 of 2010, **V. Sukumaran** vs. **State of Kerala & Anr.**, decided on 26.8.2020, to emphasize that the services rendered by an employee in one Department of a State can be taken into consideration alongwith service rendered in another Department of the State. In the case (supra), appellant joined Department of Fisheries of the State Government of Kerala as a casual labour on 7.7.1976 in a pilot project on Peral Culture at Vizhinjam, Thiruvananthapuram and worked upto 29.11.1983 rendering 7 years, 4 months and 23 days of service. Appellant thereafter joined Revenue Department, Kannur District as a Lower Division Clerk on his selection in a direct recruitment process. Appellant sought his transfer back to Fisheries Department and joined there on 18.9.1987. However, in the case at hand, petitioner joined DRDA Bilaspur initially in the year 1987 and worked there till 2012, when services of all the employees under DRDA were taken over en masse by Rural Development Department. It may be pertinent to note here that in the case at hand, earlier establishment was non-pensionable one and latter was pensionable, whereas, in the case relied upon by learned Counsel appearing for the petitioner i.e. **V. Sukumaran** (supra), both the establishments were pensionable being State Government Departments, as such, petitioner cannot derive any beenfit from the judgment (supra), as the facts of the said case are totally different from the present one.

29. Thus, the present petition is hopelessly barred by time. Accordingly, in view of detailed discussion above, this court finds no merit in the present petition, and as such, same is accordingly dismissed alongwith all pending applications.

The petition stands dismissed alongwith all pending applications.

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

Munish Kumar and others ...Petitioners

Versus

Himachal Pradesh State Electricity Board Limited and another

...Respondents

CWPOA No. 2323 of 2020
Decided on: October 13, 2020

Constitution of India, 1950- Article 226 – Petitioner No. 1& 3 regularly working as computer operator and petitioner No. 2 as chowkidar- Claimed their appointment on contract basis whereas respondents claimed their appointment on work order- Hence they have no claim for regularization- Held, that all similarly situate persons should be treated similarly – A particular set of employees were given relief in Veena Kumari vs. HPSEB & anr. CWP No. 6690 of 2010 passed by the Hon'ble High Court on 04.1.2013 all other identically situated persons need to be treated alike otherwise it would amount to discrimination under Article 14 of Constitution of India,. Petition allowed- Direction issued to the respondents to regularize the services of petitioners.

Cases referred:
State of Karnataka and Ors vs. C. Lalitha, (2006) 2 SCC 747;
State of Uttar Pradesh and Ors vs. Arvind Kumar Srivastav and Ors. (2015) 1 SCC 347;

For the petitioners: Mr. Sanjeev Bhushan, Senior Advocate with Mr. Rakesh Chauhan, Advocate.

For the respondents: Mr. Anil Kumar God, Advocate.

THROUGH VIDEO-CONFERENCING

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Petitioners Nos. 1 to 3 have been regularly working as Computer Operators with the respondents since 13.3.2009 and 28.5.2013, respectively whereas, petitioner No.2 has been rendering his services as Chowkidar with the respondents since 2002. Though the petitioners have claimed that they were appointed against posts as referred to above, on contract basis , but respondents, while acknowledging factum with regard to their engagement in their Department, have claimed that they were appointed on work order. As per respondents, petitioners were awarded typing work of Electrical Sub Division, Parwanoo, after inviting limited quotations, as such, they have no claim for regularisation. Since the petitioners had been rendering services with the respondents continuously without there being any interruption for more than ten years, as such, they are seeking regularisation, as has been done in the case of other similarly situate persons. Petitioners have categorically stated in their petition that pursuant to judgment dated 4.1.2013, passed by this Court in CWP No. 6690 of 2010 (Smt. Veena Kumarki vs. Himachal Pradesh State Electricity Board and another) and other connected

matters, similarly situate persons have been granted benefit of regularisation. Aforesaid factum has not been disputed by the respondents, rather, in their reply, they have admitted the same.

2. Having taken note of the aforesaid claim of the petitioner, which stands admitted in the reply filed by the respondents in so many words, this Court, with a view to ascertain as to whether judgment dated 4.1.2013 (supra) has attained finality or not, directed learned Counsel appearing for the respondents to have instructions. Learned counsel for the respondents, while fairly admitting before this Court that the judgment passed in the aforesaid case has attained finality, contended that the same cannot be made applicable to the case of the petitioners being a judgment in personam.

3. During proceedings of the case, learned Counsel appearing for the petitioners invited attention of this Court to the information received by the petitioners under Right to Information Act, perusal whereof reveals that similarly situate persons, who were working on work order basis, stand regularized in the respondent Board, as such, called upon learned counsel for the respondents to have instruction.

4. Today, during proceedings of the case, learned counsel for the respondent has placed on record communication dated 12.10.2020, issued under signatures of Executive Director (Personnel), HPSEBL, shimla, perusal whereof clearly reveals that the judgment dated 4.1.2013 (supra), has attained finality and pursuant to directions contained in the aforesaid judgment, services of persons, similarly situate to that of the petitioners have been regularized. Though in the aforesaid communication, respondents have stated that the services of the petitioners in the aforesaid case have been regularized in terms of direction issued by this Court, who at the relevant time had completed more than 17 years of work order but, such plea of the respondents would not make any difference, especially when it stands duly admitted on record that the persons given appointment on work order have been regularized.

5. Leaving everything aside, it has been categorically stated in the aforesaid communication, which is taken on record, that claim of the petitioners shall be considered at an appropriate stage in case their engagement is continued by the Board subject to availability of the work.

6. Having taken note of the judgment dated 4.1.2013 (supra), this Court finds that persons working on work order had approached this Court for issuance of direction to the respondents for their regularisation. In those proceedings also, respondents took defence that since petitioners have been engaged on work order their services cannot be regularized but such plea of respondents was not accepted by this court and they were directed to regularize the services of the persons as per policy of regularisation. Since no challenge, if any, to aforesaid judgment has been laid in the superior court of law, same has attained finality and the

petitioners, being similarly situate persons are also entitled for same and similar treatment, especially when it stands duly proved on record that they are similarly situate to that of petitioners in Smt. Veena Kumari (supra).

7. In the case at hand, respondents have claimed that judgment rendered by Hon'ble Division Bench in Veena Kumari's case cannot be made applicable to the case of present petitioner because the judgment is *in personam*. However, having taken note of the fact that in Veena Kumari's case, Hon'ble Division Bench of this Court has held that the persons working on work order are entitled for regularisation, all the persons working/appointed on work order are liable to be treated similarly.

8. By now, it is well settled that all similarly situate persons should be treated similarly. Only because one person approached the Court, would not mean that other persons who did not approach the court, should be meted different treatment. Reliance is placed upon decision dated 31.1.2006 passed by Hon'ble Supreme Court in **State of Karnataka and Ors** vs. **C. Lalitha**, (2006) 2 SCC 747, wherein Hon'ble Apex Court has held as under:

> "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."

9. Reliance is also placed on decision dated 17.10.2014 rendered by Hon'ble Apex Court in **State of Uttar Pradesh and Ors** vs. **Arvind Kumar Srivastav and Ors.** (2015) 1 SCC 347, wherein, it has been held 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. (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.

10. It is quite apparent from the aforesaid exposition of law laid down by 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 situate persons should be treated alike. It stands clearly ruled in the aforesaid judgment that normal rule would be that merely because other similarly situate persons did not approach the Court earlier, they are not to be treated differently.

11. Consequently, in view of above, present petition is allowed. Respondents are directed to regularize the services of the petitioners, on completion of requisite years of service, in terms of prevailing policy of regularization in the Board and in terms of principles enunciated in judgment dated 4.1.2013 (supra), expeditiously, without any unnecessary delay.

12. Petition stands disposed of in the aforesaid terms alongwith all pending applications.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

M/s Baijnath Pharmaceuticals

..Petitioner.

Versus

State of H.P & others

..Respondents.

CWP No. 2600 of 2020
Reserved on : 1.10.2020
Decided on : 16.X.2020

Constitution of India, 1950-Article 226- The petitioner participated in tendering process and his bid was accepted. Respondents No.3 placed an order for supply of medicines/ drugs etc. petitioner sought extension of time and made two representations but the extension was refused- Petitioner preferred writ of Mandamus before Hon'ble High Court- Held, that the contractual clause deals with detailed analysis- 3 truck locads already supplied by the petitioner but he failed to supply the entire order within in 90 days – It does not amount to automatic recession of contract when petitioner is willing to supply the remaining order and made communication for extension of time- Denial of extension not proper – Petition allowed.

For the petitioner: Mr. Vijay Arora, Advocate.

For the respondents: Mr. Ashwani Sharma, Additional Advocate General with Mr. J.S Guleria, Deputy Advocate General for respondents No.1 and 2.

Mr. Tarun K Sharma, Advocate, for respondent No.3.

(Through video conferencing).

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

On 2.4.2018 respondent No.3 invited quotations, for, the supply of medicines/drugs, to, respondent No.2. The writ petitioner participated in the relevant tendering process, and, after completion thereof, its bid became accepted. On 24.7.2019 respondent No.3 placed an order, with the petitioner, for, its supplying to respondent No.2, the medicines/drugs, qua, wherewith the petitioner become declared, as, a successful bidder. On 22.9.2019, the, petitioner sought extension, of, time to make the completest supplies, of, medicines/drugs, qua wherewith hence supplies/orders were placed, upon it, by respondent No.3. Moreover, the petitioner made, two successive representations, respectively on 1.11.2019 and on 10.12.2019, for the afore purpose. However, the respondents concerned, did not accord,

to the petitioner, the, espoused extension. Hence, the writ petitioner prays, for, a mandamus being made, upon, the respondents concerned, to, accord the apposite extension(s) qua it.

2. Respondents No. 1 and 2 in their reply meted, to the writ petition strived, to, blunt the afore made endevour, before this Court, by the learned counsel for the petitioner, and, the afore strivings became rested, upon, a covenant borne in clause 8.1 of the tender, clause whereof stands extracted hereinafter, a reading whereof makes trite underlinings qua (i) the respondents concerned being empowered to, at any time, during, the, period, of, operation of the tender/contract, hence place the supply/orders, (ii) and, thereupon, it becoming incumbent upon the supplier to mete absolute compliance(s) therewith, hence within 65 days, from, the date of making, of, the supplies/orders, and, also a prescription becomes borne therein, that, after 90 days, since the making of the supplies/ orders, by the respondents, hence, upon, the supplier rather no supplies being accepted rather the bid(s) standing ipso facto automatically cancelled. Nonetheless therein also occurs, a, covenant, purveying facility to the successful bidder, to seek, and its being granted, the apposite extended period of 25 days. However, the sought, for, extension hence by the successful bidder, being with a rider, in as much, as, the relevant manufacturing processes, evidently consuming more time than that, of, other manufacturing(s).

> "8.1 The supply orders may be placed at any time during the validity period of the tender/contract. It shall be incumbent upon the suppliers to perform and execute the supply orders for medicines/products in full in letter & spirit and deliver the ordered medicines/products to the consignee/indenting Rogi Kalyan Smiti within 65 days from the date of issue of supply orders failing which the late delivery charges shall be charged for supplies delayed beyond 65 days as under:-
>
> i) Day 66 to 75 @ 1% of the amount of supplies late delivered.
>
> ii) Day 76 to 85 @ 3% of the amount of supplies late delivered.
>
> Iii) Day 86 to 90 @ 5% of the amount of supplies late delivered.
>
> After 90 days, no supplies shall be accepted and the supply order(s) for rest of supplies shall stand cancelled automatically.
>
> In case of non/delayed supply by the L1 firms, the unsupplied medicines will be procured by the H.P State Civil Supplies Corporation Ltd. From the L2 and so on at risk and cost of LP approved firm.
>
> The H.P State Civil Supplies Corporation Ltd. Will be at liberty to blacklist, forfeit the EMD debar the approved supplier (defaulter) for three years, from participation in the tender for the products not supplied.
>
> However, period of 65 days can be extended by maximum of 25 days in those exceptional cases wherein the manufacturing process of some medicines takes longer time than

> that of other medicines. For this application to the Director Ayurveda shall be made well before 45th days of issue of supply orders supported by reasons for delay in supply of particular medicine. No extension shall be granted, unless it is duly issued in favour of the applicant."

3. Further more, it also becomes covenanted therein, vis-a-vis, the afore application, for the espoused extension, being made to the Director, Ayurveda well before elapsing, of, a period of 45 days. Lastly, it is also covenanted therein, vis-a-vis, there being no deemed extension, unless it is granted, through a scribed order, hence made by the authorities concerned.

4. The applicability of the afore contractual clause, vis-a-vis, the lis at hand, does necessitate makings, of, earmarkings, rather through a detailed analysis of the factual matrix, for, therethroughs discernment being made, vis-a-vis, the relevant factual matrix, becoming amenable, for, apt applying(s) thereon, vis-a-vis, the afore relevant contractual clause. The afores become(s) garnered, from, the un-controverted factum, of, the order for apposite supplies, being placed by respondent No.3, upon, the petitioner on 24.7.2019, and, thereafter it becoming incumbent, upon, the petitioner, to, within 90 days thereafter, make, the relevant supplies, to respondent concerned. However uncontrovertedly the writ petitioner supplied 3 truck loads of the relevant medicines/drug, to respondent No.2. The afore factum is borne in Annexure P-10 (colly), and, the date(s) of making, of, the afore Annexure, is, 16.10.2019/20/10/2019. Since the completest supplies rather for forbidding, the, respondents, to, invoke the rescinding power, were, under the apposite contractual clause, hence enjoined to be made, by the petitioner to respondent No.3, within 90 days, to be computed from 24.7.2019, hence the afore tenure, of, 90 days elapsed on 24.10.2019. Nonetheless thereat only a fragment, of, the supplies became made by the petitioner to respondent No.3, in as much, as, it becoming not rebutted hence by the respondents, vis-a-vis, its making some supplies/orders, before 24.10.2019.

5. Even though, upon, the afore failure(s) of the petitioner, to, within the apposite contractual tenure, of, 90 days, hence, make the contractually enjoined completest supplies, of, the relevant medicines/drugs, to respondent No.2, hence thereat ipso facto occurred automatic rescission, of, the apposite contract, (i) nonetheless a further covenant becomes borne therein, vis-a-vis, the supplier being facilitated, to, seek extension there beyond, up to 25 days, clause whereof became capitalized, by the petitioner, through its making a communication hence embodied in Annexure P-9, to, respondent No.2. However, the apposite elicited compliance affidavit, as, became requisitioned, through, an order made on 15.9.2020, hence, carries therein a disclosure, vis-a-vis, the espoused extension rather becoming refused, and, thereupon the respondents contend qua (a) theirs being empowered to invoke the echoings borne in the

apposite contractual clause, hence forbidding, the, petitioner, to, upon elapse of the apposite contractual tenure, of, 90 days, and, when thereat no completest supplies are made, by it, from hence its making, the, fullest supplies, and, rather therethrough(s) the contract becoming ipso facto rescinded (b) moreover, hence the factum of any supplies being made before 24.10.2019, by the petitioner to respondent No.2, being not construable, as, any deemed sanction, as it remained unaccompanied by any contractually enjoined scribed document, hence, authored by the authorities concerned (c) also the afore relevant contractual clause being unamenable, for judicial review, by this Court nor any principle of promissory estoppel, anvilled upon any deemed extension, being available to the petitioner, merely through its making supplies, before 24.10.2019, to, the respondent concerned.

6. This Court has made a deep circumspect application, vis-a-vis, the echoings, borne in the relevant contractual clause, and, has also applied its mind, to the impact, if any, of the deemed grant, of, extension, to the petitioner hence ensuing, from, respondents, hence accepting the supplies within or beyond 90 days. Normally this Court would not, in exercise of its constitutional discretion of judicial review, hence review the ipso facto rescission of the tender/contract nor this Court can forbid the contesting respondents, from, reembarking, upon, the relevant rebidding process. However, the afore restraints, in, the exercise of judicial review, are yet not operable, upon, there occurring pervasive vices, of, malafides or gross non-application(s) of mind by the contesting respondents, in theirs refusing to accept supplies, from, the petitioner, despite, its holding the relevant stock (i) and, despite its showing its willingness to supply them. Moreover, even when a part of the supplies became made, upon, respondent No.2 within 90 days from the date of supply order made on 24.7.2019, hence occurring within 24.10.2019, yet merely, upon, the respondents striving to enforce a contractual clause, borne in the relevant document, and, with echoings therein, vis-a-vis, on elapse of 90 days therefrom i.e 24.7.2019 (i) especially when no extension(s) were asked for, vis-a-vis, therethrough(s) hence the tender becoming amenable, for, ipso facto rescission, does also require makings, of, adjudication(s), vis-a-vis, constitutional validity thereof, hence, on the principle, of, any inviolable constitutional conscience becoming breached, or/ and on anchor, of, any stains of, arbitrariness and capriciousness, hence, percolating thereinto(s).

7. Consequently, it becomes imperative for this Court, to, unearth material hence suggestive, of, non-application of mind, and, also discover from, the material on record, qua hence, the constitutional unconscionableness, if any, of the afore alluded contractual clause, hence relied, upon, by the contesting respondents.

8. As aforestated a fragment of the supplies/orders, were made, by the petitioner to respondent No.2, and, also the afore supplies, were made within 24.10.2019. The availability

to the petitioner, of, extension being meted, to it, in the tenure, as, embodied in the afore alluded contractual clause, is, hinged upon the factum, vis-a-vis, the relevant manufacturing process, of herbs/drugs, in respect whereof, it was declared a successful bidder, in as much as, the herbs/drugs taking immense quantum of manufacturing time as also, vis-a-vis, for arranging materials, for, thereafter theirs becoming supplied. Significantly, the afore espousal, of, the contesting respondents, becomes rested, upon, consonant therewith echoings, borne, in, the relevant clause, clause whereof _stands extracted hereinbefore. In case, the afore factum is supported, by, cogent material placed, on, record, thereupon respondent No.2, in declining to mete, the, apposite extension, to the respondent, as became claimed by it, through Annexure P-9, would become frowned upon. Since the afore contractual facts, are anvilled, upon Annexure P-9, and also when there is no adequate rebuttal meted thereto, by the contesting respondents, thereupon the relevant factum borne therein, does facilitate, the petitioner, to, seek the espoused extension. In aftermath any denial thereof is unvindicable.

9. Moreover when the petitioner has supplied part, of, the drug/medicines to respondent No. 2, yet, denial thereof, through the apposite compliance affidavit hence, placing on record, the apposite abstract of diary and dispatch register, and, its disclosing, vis-a-vis, therethrough rescission being made (i) also appears to be contrived, and, invented as only stamp of Rs. 5, has been affixed, on the postal cover, and, (ii) more so when facsimile of the postal cover remains neither placed on record nor becomes appended therewith, (iii) besides when the petitioner argues that he was adopting email mode of correspondence(s) with the respondents concerned, argument whereof remains unhinged, hence the respondents in not making recoursing thereto, rather theirs recoursing the postal mode, also constrains this Court, to, make a conclusion, vis-a-vis, the respondents in a short shrift manner, and, without application of mind, and, rather with sheer malafides, rather taking to invoke, the, relevant contractual clause, against the petitioner, (iv) moreso, when despite its satisfying the relevant echoings, as, borne in the apposite clause , thereupon it becomes entitled, to, the benefit of the relevant extension hence for the relevant purpose. Moreover, any rigid adherence, to the time schedules, as, mentioned therein, would be inappropriate, (i) as thereupon the purpose or the underlying object thereof in as much, as, extensions, being affordable upon manufacturing processes evidently being delayed, would become blunted. Hence, flexibility thereto is to be assigned, moreso, when unrebutted material in consonance therewith becomes placed on record.

10. Be that as it may, though, there being no deemed extensions/grants, unless, made through authored scribing(s), and, whereupon the respondents strived, to, benumb the espousal of the counsel of the petitioner, to, claim the benefit, of, the principle of promissory

estoppel, hence ensuing from the vivid factum, of its, supplying a part, of the supplies, also appears to be ingrained, with, a vice of blatant, and, sheer constitutional unconscionableness, (i) in as much, as, the afore espousal becomes rested, upon, the respondents rather deploying the afore stratagem, for, therethroughs theirs dislodging the afore valid endevour, of, the petitioner. The afore becomes fortifyingly garnered, from, the factum, of, valid and genuine reasons becoming enclosed, in, Annexure P-9, and, theirs falling within the ambit, of, the contractual covenants, hence scribed for the relevant purpose, yet the respondents untenably invoking, the ipso facto rescinding clause, (ii) and also whereupon(s) the unconscionability, of, the clause appertaining, to no deemed extension being grantable, rather holding no vigor. Moreover when it becomes rested solitarily, on the afore deployed stratagem, for therethroughs, the contract being rescinded, despite the petitioner evidently holding the relevant stock with it, to make the supplies, thereupon also the principle, of, promissory estoppel works qua the petitioner. The respondents concerned are directed, to, place an order, vis-a-vis, the petitioner, for, the supplying, of the relevant medicines/drugs, however subject to its/their fitness, and, suitability, in all respects, being declared by the agency concerned.

In view of the above, the present petition is allowed. All pending applications stand disposed of accordingly.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR. JUDGE AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, JUDGE

Satinder Singh ...Petitioner.
Versus
State of H.P & another ...Respondents.

CWP No. 2907 of 2020
Reserved on : 27.10.2020
Decided on : 30.10.2020

Constitution of India, 1950- Article 226- Petitioner after completing 8 years of service as daily wager has sought conferment of work charge status- Held that in view of CWP No. 2735 of 2010 rendered by the Hon'ble High Court and affirmed up by the Hon'ble Apex Court, the verdict is binding and conclusive- Petition allowed- respondents directed to confer the work charge status to the petitioner along with all benefits.

For the petitioner: Mr. A.K Gupta, Advocate.

For the respondents: Mr. Hemanshu Mishra, Mr. Ashwani Sharma, Additional Advocates General.

(Through video conferencing).

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Since, a binding and conclusive judgment, affirmed up to the Hon'ble Apex Court, as, rendered in CWP No. 2735 of 2010 titled as *Rakesh Kumar* vs. *State of H.P and others*, (a) and, with a declaration of a law therein, hence bestowing an entitlement, upon, workmen, upon, theirs rendering 8 years of apposite service, to stake claim(s) towards conferment, of, work charge status, upon, them, has been averred in the writ petition, to become breached, (b) thereupon, the writ petitioner seeks conferment, of, the afore status upon him, after impugned Annexure P-1, being quashed and set aside.

2. In the reply to the writ petition, as, becomes meted, by the respondents, though therein occurs no denial, vis-a-vis, the writ petitioner's completing 8 years of daily waged service, up to 31.12.2002, yet the making of the impugned annexure, is attempted, to be vindicated rather solitarily on the ground vis-a-vis the department of Fisheries, not becoming covered, under, Annexure R-1.

3. Apparently hence the completion, of, the requisite period, of 8 years of continuous service, by the writ petitioner, on a daily waged basis, under the respondents, does not come, under any contest. Though the apt legal corollary thereof is vis-a-vis the writ petitioner becoming entitled, to, the benefit(s), of, the binding and conclusive judgment hence rendered in *Rakesh Kumar case supra*, (a) and, wherethrough an entitlement became visited, upon, the afore workman, to claim conferment of work charge status upon him, by the respondents, (b) yet the vigour of the afore made declining plea, is, to be tested. However, the potency thereof becomes straightway emaciated, through, the falsity, of, the afore imminently pleaded fact, qua, Annexure R-1 not reflecting, vis-a-vis, the Department of Fisheries, whereunderwhom the writ petitioner is serving, becoming not mentioned therein, (c) inasmuch, as, since the afore Annexure became issued in pursuance to a binding and conclusive declaration of law, made in Rakesh Kumar case, wherethrough the afore entitlement became bestowed, upon, the writ petitioner, (d) thereupon the afore declaration of law warrants reverence being meted thereto, dehors non-mentioning, of, the Fisheries Department, in, Annexure R-1 (e) especially when Annexure R-1, is, made only in pursuance to, a, binding and conclusive verdict made in *Rakesh Kumar Case supra*, and, also with Department of Fisheries, being one of the wings or an agency, of, the Government of Himachal Pradesh, and, conspicuously also when qua wherewith no exception, is, carved in *Rakesh Kumar Case supra.*

4. In view of the above, there is merit in the petition, and, the same is accordingly allowed and the respondents are directed to confer the espoused work charge status, upon, the petitioner alongwith all incidental, and, consequential thereto benefits. All pending applications stand disposed of accordingly.

No costs.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR. JUDGE AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, JUDGE

Shri Mohar Singh Khatri Petitioner.

Versus

The Managing Director, HRTC & others Respondents.

CWP No. 3947 of 2020
Reserved on : 27.10.2020
Decided on : 30.10.2020

Constitution of India, 1950-Article 226- Petitioner participated in tender invited for collection of Adda entry fee on lease basis and was declared L-1, deposited Rs. 1, 39, 320/- before R.M HRTC Rampur- agreement was also drawn inter-se the parties- Competent authority rejected the recommendation which declared petitioner as L-1- filed writ petition, feeling aggrieved court proceeded to make judicial review on power of annulling- held that selection committee did not exercise contractual power and cancelled the successful bid without assigning reasons – It was necessary to pass a speaking and well reasoned order, moreover the agreement was also drawn between the parties- Refunding of bid money to the petitioner was unworthy of acceptance- Petition allowed.

For the petitioner: Mr. B.N Sharma, Advocate.

For the respondents: Ms. Reeta Thakur, Advocate.

(Through video conferencing).

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

In pursuance, to an advertisement notice, borne in Annexure P-1, and, wherethrough(s) tenders became invited, for, collection of Adda entry fee, on lease basis, extending for a period of 11 months, vis-a-vis the new bus stand Rampur Bushehar, (i) the writ petitioner participated therein, and, also became declared L-1 (ii) and also as unfolded in Annexure P-2, he deposited, a sum of Rs.1,39,320/-, before the Regional Manager, HRTC Rampur Bushehar. Moreover, an agreement borne in Annexure P-4 became drawn inter-se the writ petitioner, and, the authorized officer, of, the respondents. The date of drawing of the agreement, embodied in Annexure P-4, is, 1st August, 2019. However, on 5.9.2020, the Divisional Manager, HP BSM & DA, Tutikandi Shimla-4, made an intimation to the Regional Manager, HRTC Rampur, with echoings therein, vis-a-vis, the competent authority rather rejecting the recommendation(s), of, the selection committee, hence declaring the writ petitioner as L-1, vis-a-vis, the auction notice, borne in Annexure P-1. The writ petitioner, becomes aggrieved therefrom, and, has motioned this Court, for, annulling Annexure P-3.

2. The reasons as become meted by the respondents, in their reply, on affidavit, furnished to the writ petition, is embodied, in the factum, of, existence, of, clause 10 in the tender form, hence investing in the selection committee, an authorization, to accept or reject any tender, and, that too without assigning any reason. Moreover, it has also been contended, in the reply, on affidavit, furnished to the writ petition, that, the amount comprised in Annexure P-2, becoming returned, to, the writ petitioner.

3. Even though, the apposite committee is invested, through, a mandate borne in clause 10, of, the tender document, to at any time, and, without assigning any reasons, rescind the bid, and, also the official or the committee concerned, is invested with a further leverage to make recourse to the apposite rebidding process. Moreover though trite expostulations of law, vindicate the empowerment(s) borne, in, the afore clause, of, the tender document, and, also pronounce qua theirs being unamenable, for, any judicial review, qua therewith being made, by the writ Court, (a) unless dependence(s) thereon, by the committee concerned, is, demonstrated, by cogent evidence, to become prodded, by constitutionally prohibited vices, of, arbitrariness or capriciousness, arising from, despite many bidders participating in the bidding process, and, therethrough there occurring competition, yet the bidding process being rescinded. However, in absence of, proof, of the afore vices becoming borne, in, the exercisings, of, the contractual rescinding power, hence by the committee concerned, and with the petitioner being not projected to be the single bidder, and, yet for ensuring a higher quantum of bid, than the bid accepted by the committee concerned, thereupon the rescinding of his bid, for, thereafter the rebidding process, being recoursed hence become an invalidly made recourse.

4. Dehors the above, this Court would proceed, to, make judicial review, of, Annexure P-3, as, (i) the afore rescinding power for annulling, the bid is invested, in the selection committee, and, obviously it is not invested in the competent authority rather higher thereto (ii) conspicuously since the selection committee, did not exercise, the contractual power, to, without assigning reasons, hence rescind the successful bid rather it become exercised, by the competent authority, whereuponwhom the afore contractual power is not vested, (iii) thereupon no valid dependence can be made thereon, by the competent authority, for vindicating, its, hence without assigning any reason rather reject the recommendations, as, made by the selection committee. Even if assumingly, the competent authority, for weighty non-contractual reasons, especially upon extraneous factors rather weighing with the selection committee, becomes constrained, to, reject the recommendations, of, the selection committee, it hence became enjoined, to make an order of rejection, through, a speaking and well reasoned order than, to, untenably in limine, and, without assigning reasons, reject the recommendation(s) of the selection committee. Significantly since no speaking order, is made,

by the committee concerned, in rejecting the recommendations, of, the selection committee, (i) thereupon the impugned Annexure, warrants interference by this Court, inasmuch, as, it perse thereupon becomes ingrained with stains, of, the constitutionally prohibited vice, of, capriciousness.

5. Further more, despite the drawing, of, an agreement inter-se the petitioner and the authorized officer of the respondents, in, pursuance to his, becoming declared a successful bidder, and, with no clause becoming borne, therein hence investing the afore power, in the competent authority, (i) thereupon, too for want of any visible contractually agreed rescinding power hence inhering in the competent authority, to without assigning, any, reasons rather make the rescinding act (ii) and when obviously through the afore, the realm of the uncontested contract, as, drawn inter-se the writ petitioner, and, the authorized Officer of the respondents, hence becomes untenably scuttled, whereupon too, the apposite rescinding act becomes invindicable.

6. Conspicuously also any power, of, rescindings, was exercise-able only prior to the execution of the Annexure P-4. In addition the making of the impugned Annexure, is subsequent, to the drawing of Annexure P-4 inter-se the petitioner, and, the responsible officer of the respondents, and, therethrough the respondents, make short shrift of clause 11, clause whereof stands extracted hereinafter, thereupon also the impugned Annexure, is, made in a post haste, and, short shrift manner, and, hence becomes ingrained, with, the vice of capriciousness.

> "11. All dispute between the HP City Transport and Bus Stand Management and Development Authority and OSD (Regional Manager) HRTC ….. and the contractor arising out of this agreement deed entered into or in relation thereto regarding the interpretation of any clause of or condition thereof shall be referred to the decision of the Chief Executive Officer, HP City Transport and Bus Stand Management and Development Authority and the same shall be treated as a reference under the provisions of Arbitration Act 1940."

7. A reading whereof conveys qua its' operating, as an arbitration clause, upon, any dispute arising amongst the signatories, thereto, (i) hence, even if any dispute, during currency of contract arose inter-se signatories thereof, it became amenable for its becoming referred, to the Arbitrator as mentioned therein, rather than Annexure P-4 becoming rescinded or annulled, through, an unwarranted non-speaking order, embodied in Annexure P-3.

8. It is also important to emphasize qua the afore extracted clause rather not also contemplating the apt recoursable remedy, to the aggrieved, upon, deviation(s) being made by the errant contractee, vis-a-vis, any of the clause(s) hence embodied therein, inasmuch as (a)

the statute in consonant wherewith, the dispute resolution mechanism, is therein contemplated inasmuch, as, the aegis, of, an Arbitrator, is the nowat, rather repealed Arbitration Act of 1940, and, reiteratedly hence clause 11 supra, borne in Annexure P-4, becomes completely redundant nor is a workable remedy, vis-a-vis, any of the aggrieved, from any deviations made, by the errant contractee vis-a-vis any of the conditions, embodied therein (b) nor hence any arguments, can be raised thereon, by the respondents, that the extant remedy, is not an efficacious remedy, given the afore remedy being available, for, recoursing to the writ petitioner.

9. Moreover the refunding of the bid money by the respondents to the petitioner, is also unworthy of acceptance as the respondents, upon, the petitioner making the afore deposit hence accepted it, and, thereafter contractually permitted the writ petitioner to operate the bid, without any obstacles or hindrances.

10. In view of the above, the present petition is allowed, and, the impugned Annexure is quashed and set aside. However the petitioner is directed to make the deposit of bid money within a week hereafter before the respondents. All pending applications stand disposed of accordingly.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR. JUDGE AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, JUDGE

Sh. Pratap Singh — Petitioner.

Versus

State of H.P & others — Respondents.

CWP No. 2895 of 2020
Reserved on : 27.10.2020
Decided on : 30.X.2020

Constitution of India, 1950- Article 226- Petitioner stood retired from service on 31.10.2016, but his pension case was not proceeded by the respondents- Felt aggrieved and filed writ petition- Held, that petitioner rendered service under the respondents on work charge basis and regularized as chowkidar- Verdict recorded in CWP No. 6167 of 2017, titled as Sunkru Ram vs. State of H.P and others decided on 6.3.2013 are attracted and the petition was allowed with direction to process the possession papers, to compute the period of his service in work charge capacity as qualifying period and to grant all retiral benefits to him.

For the petitioner(s): Mr. A.K Gupta, Advocate.

For the respondents: Mr. Hemanshu Mishra, Mr. Ashwani Sharma, Additional Advocates General for respondents No. 1 to 4.

Mr. Sudhir Thakur, Sr. Advocate with Mr. Karun Negi, Advocate, for respondent No.5.

(Through video conferencing).

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The writ petitioner became superannuated from service on 31.10.2016, however, since the respondents failed to process, his pension case, nor obviously bestowed, upon him, all the apposite pensionery, and, other retiral benefits, merely, on the prime arch, of, validly discarding(s) being made, vis-a-vis, those period(s) of his rendering service, under, the respondents, hence on a work charge basis, (a) thereupon, the petitioner strives through the instant petition, for, a mandamus, for the espoused purpose, being made upon the respondents.

2. The uncontroverted fact which makes its starking upsurging, appertains to work charge status, becoming conferred, upon, the writ petitioner w.e.f 1.1.2001. However non-computation of the period of service, hence rendered, in a work charge capacity by the petitioner under the respondents, becomes arched upon the factum, vis-a-vis the afore factum being under consideration, of, the law Department, of, the Himachal Pradesh Government.

3. However the afore reared contention, becomes completely, ripped of its efficacy, through a verdict recorded, on 18.12.2018, by this Court in CWP No. 2384 of 2018 titled as State of H.P and others versus Sh. Matwar Singh and another, (a) wherein a declaration of law exists qua the period of rendition of service, by an employee, in a work charge capacity, and, whereafter it becomes succeeded, by, a regular appointment, (i) thereupon it becoming amenable for its computation, hence, as the apposite qualifying service, for, the purpose of pension, and, also for the purpose, of, other retiral benefits.

4. Since it is also mandated therein qua executive instructions, to the contrary, if any, issued by the Finance Department, theirs rather becoming amenable to be discountenanced or being quashed and set aside, especially in the light, of, the verdict recorded in CWP No. 6167 of 2017, titled Sukru Ram vs. State of H.P and others, decided on 6.3.2013. Since in tandem therewith, after, the conferment of work charge status, upon the petitioner w.e.f 1.1.2001, he became regularized in service, as a chowkidar, under, the respondent w.e.f 2.8.2006, (i) thereupon the afore mandate, as, becomes cast, in the judgment supra becomes squarely attracted qua him (ii) dehors any of constraints, as, become projected by the respondents in their reply. Moreover the vigor, of, the afore verdicts underwhelms the effects, of, any executive instructions, to the contrary, rather it alone holds completest clout and sway qua the afore *res controversia*.

5. In view of the above there is merit in the petition and the respondents are directed to forthwith process the pension papers of the writ petitioner and are also directed to

compute the period, of, rendition of service by him, in a work charge capacity, under the respondents, as, the apposite qualifying period, for computation(s), of, pension and also for bestowing, upon him, other retiral benefits. All pending applications stand disposed of accordingly.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR. JUDGE AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, JUDGE

Kushal Chand Petitioner.

Versus

State of H.P & others Respondents.

CWPOA No. 4686 of 2020
Reserved on : 1.10.2020
Decided on : 16.10.2020

Constitution of India, 1950- Article 226- Petitioner completed 10 years of service as daily wager under the respondent but work charge status was not conferred upon him-it was held that petitioner failed to satisfy all the parameters of completion of 240 days of continuous service, Moreover non- continuity and disruption of service is agitable upon the Industrial Tribunal- No merit was found in the petition and it was dismissed.

Cases referred:

Mool Raj Upadhaya vs. State of H.P & others reported in 1994 Supp.(2) SCC 316;

Mohd. Abdul kadir and another versus Director General of Police, Assam and others, reported in (2009) 6 SCC 611;

For the petitioner: Mr. Daleep Singh Kaisth, Advocate.

For the respondents: Mr. Ashwani Sharma, Additional Advocate General with Mr. J.S Guleria, Deputy Advocate General.

(Through video conferencing).

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The petitioner claims that since he has, within the domain, of, the pronouncement made by the Hon'ble Apex Court, in, a case titled, as, *Mool Raj Upadhaya* vs. *State of H.P & others* reported in 1994 Supp.(2) SCC 316, hence completed 10 years of rendition(s) of daily waged service(s), under, the respondents, (i) thereupon, the rejection of his claim, for conferment, of, work charge status upon him, is un-vindicable, and, hence he prays that Annexure A-1, be quashed, and, he be granted, the, espoused relief, by this Court.

2. This Court would countenance, the afore made contention, before this Court, by the petitioner, upon, his satisfying the relevant parameters, as, become enshrined in the afore judgment, (i) in as much as, in all the 10 years of services, under, the respondents, more

precisely in each, of, the relevant calendar year(s), his completing 240 days of continuous service. However, a perusal of the reply discloses that he has not completed 240 days of continuous service, in the calendar year(s) appertaining to 1993, 1994, 1995 and 1997, and, hence the afore espoused contention, is, un-amenable, for acceptance, by this Court.

3. However, the learned counsel for the petitioner, submits that the afore non-completion(s) of continuous service, in as much, as, of 240 days of continuous service, in each of the afore calendar years, being a sequel, of, untenable fictional and artificial breaks being intentionally administered, by the respondent-employer, rather merely for making malafide disruption(s), in, the continuity, of, his service. In making the afore made contention, the learned counsel for the petitioner, has made reliance, upon, a judgment rendered in a case titled, as, *Mohd. Abdul kadir and another* versus *Director General of Police, Assam and others*, reported in (2009) 6 SCC 611, wherein the afore administered fictional breaks become frowned, upon, by the Hon'ble Apex Court. However a deep reading of the afore judgment, does not carry forward, the espousal made before this Court, by the learned counsel for the petitioner, as, therein rather through a circular, the afore made breaks, become enjoined to be administered, vis-a-vis, the employees therein, and, (a) thereupon perse, hence, a conclusion became sparked, vis-a-vis, the administered breaks, as, made rather causing untenable disruption(s), in, the continuity, of, service, of, the employees. Contrarily hereat there, is, no circular placed, on, record by the learned counsel for the petitioner, hence, wherethrough the respondent concerned, has meted fictional breaks, for, therethrough his causing untenable disruption(s), in, the petitioner's hence rendering continuous service of 240 days, rather in each, of, the relevant calendar year(s), precisely respectively, in, the year(s) 1993, 1994, 1995, and, 1997. Consequently for, lack of placing on record, a, circular analogous to the one existing before the Hon'ble Apex Court, and, whereon(s) the afore judgment, became rendered, does obviously, beget an inference, qua, the hereat made breaks, in service neither becoming ingrained with any malafides reared by the respondents, to, therethrough, theirs ensuring disruption(s), being caused in the continuity, of, service of the petitioner, under, the respondents, merely for dis-empowering him to claim, the, benefit of *Mool Raj Upadhaya* case supra.

4. It also appears that obviously the afore breaks, are, to be construed to be on account, of, abstention from service, of, the petitioner, (i) unless demonstrated to arise, from, disruptions being caused, upon, continuity, of, service, despite availability, of, works to be performed, and, also despite there happenings, of, the petitioner offering to render them, hence respondent breaching the mandate of Section 25-G of, the Industrial Disputes Act, 1947 (ii) whereupon, any breaching(s) thereof, becoming agitate-able, only upon the Industrial Tribunal concerned, being seized, with, an apposite reference, as, becomes made qua therewith, (iii) nor

also when the afore breaks are condonable, through the extant petition, rather, are condonable through an award, being rendered by the Labour Court-cum-Industrial Tribunal concerned, upon the latter being beset, with the apposite reference, as, becomes made thereto, by the Tribunal Concerned, thereupon, all the afore(s) are not agitate-able before this Court.

5. In view of the above, there is no merit in the petition, and, the same is accordingly dismissed. All pending applications stand disposed of accordingly.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR. JUDGE AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, JUDGE

Ram Chand & Others — Petitioners.

Versus

Himachal Pradesh University and others — Respondents.

CWPOA No. 4915 of 2020
Reserved on : 1.10.2020
Decided on : 16.10.2020

Constitution of India, 1950- Article 226- Petitioner inducted and joined as Clerks amongst 90% quota reserved for direct recruitment and were regularized. Because aggrieved by entries in tentative seniority list whereas they were placed below the two candidates belonging to the category of 10% promotion from amongst them as incorrect arranging of seniority- Held, that R & P rules empower the vice-Chancellor to make adhoc appointments against any of the posts for particular period which is extendable- The clause in unchallenged- nothing to prove that there was any mala-fide- No merit found and writ petition was dismissed.

For the petitioners: Mr. Malkeeyat Singh, Advocate.

For the respondents: Mr. Surender Verma, Advocate for respondent No.1.
Mr. Dinesh K Thakur, Advocate for respondents No. 2 to 7.
(through video conferencing).

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The petitioners were initially appointed, as clerks, on, a contractual basis. Their recruitment and appointment as clerks, on, a contractual basis, was, in pursuance to advertisement(s) hence respectively published, on 12.8.2010, and, on 27.1.2011. The writ petitioners joined as clerks, under, the respondent-University, upon, their induction(s) thereinto, from, amongst, a, 90% quota reserved, for, direct recruitment, in stream whereof, hence the petitioners evidently fall. The apposite regularization(s), of, the petitioners also occurred subsequently. However, the petitioners become aggrieved from, the, publishing, of, a tentative seniority list, hence, borne in Annexure P-11, wherein, the petitioners stand placed below, the, appointees occurring at Sr No. 37 to 64, all wherewhom, belong to the category, or

vis-a-vis, the stream of promotees, qua whom a 10% quota, for promotion is reserved, under, the apposite R&P Rule No.6, relevant portion of the rule whereof, stands extracted hereinafter.

> "6. (a) (iii) The posts of Clerks shall be filled up as under:-
> (a) 90% by direct recruitment.
> (b) 10% by promotion from amongst the Category 'D' employees."

2. The writ petitioners challenged, the afore incorrect assigning of seniority to them, and, to the afore appointees, rather, on, anvil of a manifest breach, of, the afore quota norms hence visibly happening.

3. In the reply, meted to the writ petition, the respondent-University, raised a contention therein, vis-a-vis, the occurrence, of, the afore appointees, above the writ petitioners hence in the seniority list, rather bearing consonance with the time(s), of, their regularization(s), as clerks, in, a substantive capacity, under, the respondent concerned, (i) thereupon, the afore respondent contend, that since the afore, has been made in consonance, with the relevant rules, besides, is in tandem with terms and conditions, of the apposite policy, (ii) and also with the happenings, of, regularization(s) in service, of the petitioners, in a substantive capacity, when becomes anchored, on, a tenable policy, rather remains unchallenged, vis-a-vis, its vires (iii) thereupon, the timings of the occurrence, of, regularization(s) in service of the petitioners, from, their hitherto initial induction(s) thereinto, on, a contractual basis, becoming the apposite norm(s), for, fixing the inter-se seniority, of, the petitioners, and, of the afore appointees.

4. The afore contention in the reply, as, meted to the petition, by the respondent-University remains unchallenged, by the writ petitioners. Moreover, also the afore factum remains, unchallenged, by the petitioners, vis-a-vis, the induction(s) or promotion(s), of, the appointees concerned occurring, hence, in a substantive capacity, as, clerks in the apposite feeder category, rather at a time much, earlier than the regularization(s), of, the petitioners, from, their hitherto contractual capacity. Consequently, for only want, of, efficacious challenge(s) becoming cast thereon, the prior induction(s) in service, of the appointees concerned, vis-a-vis, the petitioners, under the respondent-University, does since then, equip them to claim seniority above the writ petitioners, who rather became thereafter regularized, and, therethrough only thereat donned the apposite substantive post(s), under, the respondent-University.

5. Further more, an endevour is also made by the learned counsel for the petitioners, to, challenge the induction(s) of the appointees concerned, as clerks, under the respondent-University, from the feeder class or category, of, class D employees, and, he makes challenges thereons, on the ground that, despite, a 10% quota becoming fixed for them, yet, the

afore fixed per centum of quota, qua the appointees concerned, rather untenably becoming repeatedly breached, (i) whereupon, the induction(s), of, the appointees concerned, as, clerks, hence, against any substantive post(s) being unmerit-worthy, hence also for, theirs becoming assigned seniority, over, the writ petitioners.

6. However the afore made contention, by the learned counsel, for the petitioners become blunted, from, the factum of clause 7, occurring after clause 6 of the R&P Rules, and, clause whereof stands extracted hereinafter, and, rather both empowering the vice chancellor, to dehors any of the preceding therewith, prescription(s) becoming borne, (i) hence, to make adhoc appointment(s) against, any of, the posts, under these rules, for a period not exceeding one year, and, further, with a proviso that, thereafter, the afore empowerment, vis-a-vis, the employees, being extendable yet with the concurrence, of, the Executive Council of H.P.

> "Notwithstanding anything contained in these Rules the Vice-Chancellor will have the authority to make an adhoc appointment against any of the posts covered by these Rules for a period not exceeding one year, provided that the period will be extendable by one year with the concurrence of the Executive Council."

7. Since the afore notwithstanding clause or a clause operating hence as a proviso, vis-a-vis, the preceding therewith echoings, has been evidently demonstrated, through, a sworn affidavit, to become validly exercised, (i) thereupon, since the afore proviso also empowers the vice chancellor, to, for another year, hence with concurrence of the executive council, rather enhance or curtail the afore per centum of quota, fixed for the promotees, as become drawn from amongst category, of, class D employees, for, theirs being inducted as clerks. Consequently, with the vires, of, the afore notwithstanding clause remaining unchallenged, nor its exercise being proven to be exercised, with malafides nor when the making of the apposite relaxation remains un-advocated to be invalidly made. Consequently, the prescribed quota, if any, meant for the petitioners, and, not for the appointees concerned, if becomes breached, yet breach whereof, cannot be construed to be outside the realm, of, the non obstante clause hence occurring in the clause 6, of, the apposite rules.

8. In view of the above, there is no merit in the petition, and, the same is accordingly dismissed. All pending applications stand disposed of accordingly.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR. JUDGE AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, JUDGE

CWPOA No. 7937 of 2019

Bansi Lal Petitioner.

Versus

State of H.P & others Respondents.

CWPOA No. 8031 of 2019

Sushma Devi Petitioner.

Versus

State of H.P & others Respondents.

CWPOA Nos. 7937 and 8031 of 2019
Reserved on : 28.10.2020
Decided on : 30.X.2020

Constitution of India, 1950- Article 226- Both the writ petitioners were working as daily wagers under the respondents, completed the qualifying period of service but not regularized and their services were terminated- Both felt aggrieved and preferred writ –It was observed that the averments are bald and not supported with material , rather it is a case of breach of conditions which will fall under Industrial Disputes Act- Petitioners not enrolled on muster roll and there is non completion of 240 days of continuous service in a year-Both writ petitions dismissed with direction to exercise the alternated remedy.

For the petitioner(s): Mr. Arun Kumar, Advocate.

For the respondents: Mr. Hemanshu Mishra, Mr. Ashwani Sharma and Mr. Narender Guleria, Additional Advocates General.

(Through video conferencing).

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Since both the writ petitions are directed, against, the common employer of both the writ petitioners, and, also when in both the writ petitions, the legality of the denial(s) to them, of, the strived for relief, of, theirs being regularized, from their hitherto capacity, as, daily waged workmen, rather against a substantive post, enjoins making(s), of, an adjudication (i) and, also when the apposite denials, as, meted on affidavit, by the respondents, are, similar in both the writ petitions, thereupon, both the writ petitions are amenable, for, a common verdict hence becoming rendered thereon(s).

2. The writ petitioners' contention, as, contained in both the writ petitions, is, hinged upon a bald averment, vis-a-vis, each rendering duties, on a daily waged basis, under, the respondents, (i) and, despite theirs also completing the requisite period, of, qualifying service, for, theirs being regularized against, the apposite substantive post, (ii) rather the respondents proceeding, to, make the apposite impugned Annexures rather wherethrough their services became terminated.

3. Moreover, a common averment, is, also borne in both the writ petitions, in as much, as, the employer concerned rather with malafides administering fictional breaks in their service, (a) conspicuously with a clear intention to preclude them, to, render 240 days of continuous service, in each of the calendar years concerned, and, also obviously when concomitant thereto, legal detriments, became visited upon them, inasmuch as (b) thereupon, the canon appertaining to the requisite period of qualifying service, in the, apposite preceding years, hence with a contemplation, vis-a-vis, in each of the preceding years, each of them, completing 240 days, of continuous service, hence becoming rendered untenably unworkable, vis-a-vis, the workmen/petitioners.

4. As aforestated, all the afore averments, are completely bald, and, obviously are completely bereft of any material, in, support thereof, and, as may become comprised in (a) a certified copy of muster rolls, evidencing the pleaded factum, of, the petitioners becoming enrolled, on muster rolls, under the respondents (b) there occurring signatured entries against their muster rolls hence depictive of theirs' receiving per dime wages, vis-a-vis, the daily waged work(s), as become performed, by each, of them, under, the respondents.

5. Moreover, there exists no iota evidence of material, on record, in support of, an obvious bald contention raised, in both the writ petitions (a) that despite juniors to the petitioners/workmen continuing, to, render work under the respondents, rather, the workmen/petitioners, being through an order, made in the apposite Annexures, being axed from service. Even though the retention, of, workmen, junior to the writ petitioners, after the latters becoming axed, from service, would constitute a starking breach, being visited, upon, the mandate comprised, in, Section 25-G of the Industrial Disputes Act, 1947, (a) hence with a prescription, against the employer to disengage workmen despite juniors to him, theirs becoming retained in service. Nonetheless the afore factum would gather support obviously only upon cogent documentary evidence in support thereof, being placed on record. However, the apposite documentary evidence in support thereof is grossly amiss, and, thereupon the afore made averment, is, starkly bald, and, cannot work with the apposite capitalizing effect, to, the workmen.

6. In addition even if the afore breach became visited, upon, Section 25-G of the Industrial Disputes Act, 1947, (a) thereupon, the remedy for curing the afore breach, is not comprised, in the writ petitioners invoking the writ jurisdiction rather is comprised in theirs raising an industrial dispute, under, the Industrial Disputes Act, (b) and, upon failure of conciliation, theirs seeking a reference, from, the appropriate government, to the Labour Court, cum-Industrial Tribunal, for, hence thereon a decision becoming rendered, by the Labour Court-cum-Industrial Tribunal concerned.

7. Be that as it may, the effect of non-existence, of, the afore imperative evidence, when becomes entwined with, the afore wants or omissions, on, the part of the writ petitioners, to, bring the afore evidence, in record besides when becomes coagulated alongwith, the, unrebutted contentions raised in reply(s), furnished to the writ petitions by the respondents, and, theirs making graphic depictions, of, completest denials, of the afore averments, raised by the writ petitioners, thereupon this Court is coxed to make a firm inference (a) qua the writ petitioners not being enrolled on muster rolls by the respondents (b) rather theirs being employed, as, part time workers, and, (c) theirs receiving wages on an hourly basis, as, evident from the un-rebutted reply(s) furnished, to the writ petitions, by the respondents.

8. Further more, the factum of the respondents, with malafides hence administering fictional breaks, in, the service of the petitioners, rather only for depriving them to complete 240 days of continuous service, in each of the apposite years, alongwith further legal detriments, being visited upon them, (i) inasmuch, as, theirs being defacilitated, to, claim the relief of regularization in service, against, the substantive post, is also, a misraised and misfounded plea, inasmuch as (ii) for lack, of, existence on record, of, certified muster rolls, hence paves way for a conclusion in support, of, unrebutted contention, reared in the reply furnished by the respondents, qua, theirs being engaged, as, part time workers, and, theirs receiving hourly wages, hence thereupon the edifice, of, the afore espousal, as, made before this Court, by the petitioners becomes completely shattered.

9. Further, in the respondents taking to administer malafide fictional breaks in service of the petitioners, despite availability of works, and, even if assumingly they were made to cause, the afore impediments or to raise obstacles, against the petitioners, receiving benefits of regularization in service, (i) also, enjoined existence of material on record, comprised in a circular/order, issued by the respondents, and, its declaring the necessity, of, administering, of, fictional breaks, in, the service of the petitioners. However, the afore order is amiss, and, thereupon the breaks, if any, in the apposite service(s), if administered by the respondents, cannot assume the vice of malafides, rather may be attributable, to abstention, from service of the workmen, (i) and, obviously for settling the afore factum, the remedy available to the writ petitioners, is not through, theirs invoking the writ jurisdiction, rather is to through theirs ensuring, the, making of a reference qua therewith by the appropriate government, to, the Labour Court-cum- Industrial Tribunal concerned.

10. In aftermath the invocation of writ jurisdiction, is, a gross mis-strivings, and, hence no relief can be conferred, upon, the writ petitioners, necessarily hence the writ petitions are dismissed. It is clarified that they may opt to exercise the afore alternate remedy, for, theirs

therethrough redressing their grievances, against the employer. All pending applications stand disposed of accordingly.

No costs.

BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, JUDGE AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

1. **CWP No 2232 of 2018**

Ashok Negi .....Petitioner.

Versus

State of Himachal Pradesh & anr. .....Respondents.

2. **CWP No. 2320 of 2018**

Ms. Poonam Chanderika & anr. .....Petitioners.

Versus

State of Himachal Pradesh & ors. .....Respondents.

3. **CWP No. 2379 of 2018**

B.R. Sharma & ors. .....Petitioners.

Versus

State of Himachal Pradesh & anr. .....Respondents.

CWP Nos. 2232, 2320 & 2379 of 2018
Reserved on: 05.11.2020.
Decided on: 12.11.2020.

Constitution of India, 1950-Article 226- Three writ petitions filed by the petitioners on the ground that Government is not opening colleges which were announced by previous government during 2017 i.e, Govt. Degree College Jeori, Powabo and Narag- A meeting held under the chairmanship of Hon'ble Chief Minister and it was not considered appropriate to make newly announced colleges functional – Held opening of Govt college is policy decision of the Government having limited scope of judicial review- Interim order vacated and writs disposed of with direction to respondents to take appropriate final decision.

Cases referred:

State of Karnataka and Another versus All India Manufactures Organization and Others, (2006) 4 Supreme Court Cases 683;
Bannari Amman Sugars Ltd. Versus Commercial Tax Officer and others, (2005) 1 Supreme Court Cases 625;
Mohinder Singh Gill and another versus The Chief Election Commissioner, New Delhi and others, (1978) 1 Supreme Court Cases 405;
State of Tamil Nadu and others versus K. Shyam Sunder and Others, (2011) 8 Supreme Court Cass 737;
Andhra Pradesh Dairy Development Corporation Federation versus B. Narasimha Reddy and others, (2011) 9 Supreme Court Cases 286;
Chintpurni Medical College and Hospital and another Versus State of Punjab and Others (2018) 15 Supreme Court Cases 1;
Asha Ram and another versus State of H.P. and others.ILR 2015(4) HP 635;

For the petitioner(s):		Mr. Shrawan Dogra, Senior Advocate with Mr. Deven Khanna, Advocate, for the petitioner in CWP No. 2232 of 2018. Mr. Kush Sharma, Advocate, for the petitioners in CWP No. 2320 of 2018. Mr. Rupinder Singh Thakur, Advocate, for the petitioners in CWP No. 2379 of 2018.
For the respondents	:	Mr. Ashok Sharma, Advocate General with Mr. Vinod Thakur, Mr. Shiv Pal Manhans, Addl. AGs, Ms. Bhupinder Thakur, Ms. Seema Sharma and Mr. Yudhbir Singh Thakur, Dy. AGs.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, *Judge*

These writ petitions have been filed *pro bono publico* claiming inaction on part of the respondent-State Government in not opening certain Colleges, which were announced by the previous government during the year 2017.

2. Involving common submissions, these writ petitions are taken up together for decision. For convenience facts of CWP No. 2232 of 2018 are being considered hereinafter.

On 15.8.2017, the then Hon'ble Chief Minister announced opening of a Government Decree College (in short 'GDC') at Jeori, District Shimla. Opening of this new

College was notified on 6.9.2017 from academic session 2017-18. From the record appended with the writ petition, it appears that the Sub Divisional Magistrate, Rampur was requested on 30.8.2017 by the Principal, GDC, Rampur to identify the land for the already announced new College at Jeori. A report furnishing details of colleges and schools existing in the area/Sub Division alongwith their distances from Jeori and the number of students enrolled in the schools was furnished to the department on 1.9.2017. On 12.9.2017 with handing over of four rooms of Government Senior Secondary School, Jeori to Government Decree College, Jeori, the Principal of GDC, Jeori announced start of newly opened GDC, Jeori. The State accorded consolidated administrative approval of Rupees fifteen crores and consolidated expenditure sanction for a sum of Rupees three lacs out of lump-sum budget provision made during the FY 2017-18 for construction of buildings of three Colleges including the newly announced GDC, Jeori vide letter dated 18.9.2017. The College was inaugurated by the then Hon'ble Chief Minister on 19.9.2017. On 22.9.2017 certain teaching and non-teaching posts were created for the College. Some staff was subsequently deployed there. On 31.10.2017 Rupees one lac was sanctioned and remitted for the construction work of College building.

4. The grievance raised in the writ petition is that with change of political guard, the situation in respect of functioning of the College also changed. The construction work of College building did not start. The staff deployed/posted in the newly opened College was transferred elsewhere. The college did not function despite the fact that 13 students including 10 girls had taken admission in the College for the academic year 2018-19. It is against this background that the writ petition has been instituted for the following prayers:

> *"i) That the respondents be directed to immediately initiate and complete in a time bound manner the selection procedure for the recruitment of Teaching as well as Non-Teaching staff and fill up the sanctioned posts at the Government Degree College, Jeori;*
>
> *ii) That this Hon'ble Court may please direct the respondent to complete the process of transfer of identified land in the name of the GDCand begin and complete the construction work of the College building in a time-bound manner;*
>
> *iii) That till such time as the recruitments are made against the sanctioned regular posts as per prayer clause (I) supra,the respondents may kindly be directed to deploy required staff on deputation basis as a stop-tap measure as was done at the time of opening of the College in September 2017;*
>
> *iv) That in view of the news report, Annexure P-19, the respondents may be directed to not take any decision in the nature of closing of the College on this pretext or that except with the leave of this Hon'ble Court."*

The matter was listed on 20.9.2018, when following order was passed:

> *"Learned counsel for the petitioner undertakes to remove the objections, if any raised by the Registry. Such undertaking is taken on record.*
>
> *Notice returnable for 25th October, 2018. Mr. Adarsh K. Sharma, learned Additional Advocate General, appears and waives service of notice on behalf of the respondents-State. Response be positively filed within a period of two weeks and rejoinder thereto within two week thereafter.*
>
> *List on 25th October, 2018. In the meanwhile,* ***status quo as on date shall be maintained****. Also any decision taken, adversely affecting the College in question, shall not be implemented without leave of the Court."*

CWP No. 2320 of 2018 and CWP No. 2379 of 2018 instituted with similar issues pertain to Government Degree College, Powabo, District Shimla and Government Degree College, Narag, District Sirmour, respectively. Opening of these two new Colleges was also announced in September 2017 but steps required to be initiated in furtherance of decision to open the Colleges were not taken. It is alleged that decision has been taken by the respondents to de-notify the newly opened Colleges. Hence citing public need to make the new colleges functional, these writ petitions have been preferred challenging the decision to de-notify the newly opened colleges.

5. We have heard learned Counsel for the parties and gone through the record. The gist of submissions made on behalf of petitioners is that government runs in continuity. It is the prerogative of the State to frame policies and to review them. However, the decision making process has to be objective, reasoned and has to abide by the settled legal principles. In the instant case, notification announcing opening of new colleges was the outcome of careful consideration and analysis of all relevant aspects. Continued inaction on part of State to make these colleges functional is against principles of the welfare state and Rule of law. Public cannot to made to suffer due to lackadaisical attitude of State. In support of the submissions and prayers made in the writ petition, reliance was placed upon ***(2006) 4 Supreme Court Cases 683***, titled *State of Karnataka and Another* versus *All India Manufactures Organization and Others,* ***(2005) 1 Supreme Court Cases 625,*** titled *Bannari Amman Sugars Ltd.* Versus *Commercial Tax Officer and others*, ***(1978) 1 Supreme Court Cases 405***, titled *Mohinder Singh Gill and another* versus *The Chief Election Commissione*r, *New Delhi and others,* ***(2011) 8 Supreme Court Cass 737***, titled *State of Tamil Nadu and others* versus *K. Shyam Sunder and Others****, (2011) 9 Supreme Court Cases 286***, titled *Andhra Pradesh Dairy Development*

Corporation Federation versus *B. Narasimha Reddy and others*, ***(2018) 15 Supreme Court Cases 1,*** titled *Chintpurni Medical College and Hospital and another* Versus *State of Punjab and Others* and ***ILR 2015(4) HP 635,*** titled *Asha Ram and another* versus *State of H.P. and others*.

Learned Advocate General referred to a notification dated 2.1.2014 whereby guidelines with respect to opening of new educational institutions/Government Degree Colleges were notified to achieve the objectives of access, equity and quality in Higher Education. These guidelines were framed pursuant to a judgment delivered by this Court in CWP No. 1468 of 2013 alongwith other connected matters, titled Dhrub Dev Sharma and others versus State of Himachal Pradesh and others. While delving on the issue of de-notification of eight newly opened Government Colleges, following was observed in the aforesaid judgment:

> *"17. It was then argued that somehow in this State it has become routine that the succeeding State Government reverses the decisions taken by the previous Government. In a given case that can be frowned upon as improper and inappropriate. But, it cannot be the basis to interdict the impugned decision of the Government taken after due deliberations and reviewing the fact situation, unless it is further shown that the same is contrary to any statutory provision or the Constitution or for that matter mala fide exercise of power. Nothing of that can be stated in the present case.*
>
> *18. Indeed, the petitioners may be justified in contending that the State Government cannot be permitted to raise the bogey of financial implications and unviability to run those 8 new Colleges. However, in the present case, the reason recorded by the Authority in the impugned decision is not about financial inability, but about low enrollment of students, lack of infrastructure and close proximity to other Colleges, which is completely independent of that. As regards the first justification about low enrollment in the respective Colleges, that is indisputable. In that, only 19, 14, 37, 10, 12, 4, 2 and 16 students have been admitted in the respective 8 Colleges for the academic year 2012-13. These figures are self eloquent and reinforce the reason so stated in the impugned decision. On that singular reason, the State Government, in our opinion, could have sustained the impugned decision, as it has come on record that even these admissions were not direct admissions, but students were taken in the said Colleges by way of transfer, from the other institutions in the neighbourhood. The argument of the petitioners, however, is that, low number of students in the respective Colleges is because of late starting of the College. That does not commend to us. For, the College at Kotla Behar was opened, vide order dated 23rd June, 2012, just about the same time when the academic year commenced and yet only 16 students were admitted in that College. The Colleges at Rewalsar, Nihri, Ladbharol in District Mandi and Sarahan in District Sirmour were started in terms of*

decision, dated 20th July, 2012. But, even those Colleges could admit only 19, 14, 37 and 12 students, respectively.

19. It is not only matter of low enrollment of students, but the decision was warranted also because of lack of infrastructure, inasmuch as each of these eight new Colleges were started in the premises of 3 to 5 rooms set apart from the Government Senior Secondary School building in the same locality. Such arrangement was carved out only to honour the directions given by the then Chief Minister. Such arrangement inevitably impacted the quality education imparted in the said Schools. It is not clear from the record as to whether the said Government Senior Secondary Schools had excess rooms after adhering to the norms and standards for schools specified in the Right of Children to Free and Compulsory Education Act, 2009; and moreso have not breached any of the specified conditions thereof by setting apart premises consisting of 3 to 5 rooms from the buildings of their respective Schools, which, obviously, has been done under dictation. If it is a case of breach of the provisions of the Act of 2009, that would be a serious matter warranting appropriate action against the concerned officials and Authorities, who have taken such a drastic decision to compromise on the quality education of the students studying in those Schools. Be that as it may, it is unfathomable that a full fledged College can be run from 3 to 5 rooms, which is expected to have a complete set up as per the University Grants Commission norms, before grant of affiliation. Whether the provisional affiliation granted by the University to these eight new Colleges also must come under scanner, is a matter to be considered by the Appropriate Authority of the University and proceed against the erring officials in that behalf, in accordance with law.

22. Notably, from the original record, which was produced before us, it is evident that first public announcement was made by the then Chief Minister and then the process of paper work was commenced; and to fulfill the said commitment, a make-shift arrangement was worked out for opening of the new Colleges in the premises of the Government Senior Secondary School of the concerned area. That was obviously done under dictation. This is the common pattern emerging from the record. No doubt, the formality of submission of report before issuance of a formal order/notification for opening of new Colleges was undertaken. That, however, cannot justify the action taken in undue haste and bereft of any policy of the Executive in that behalf. What is significant to notice is that in a short span, decision was taken to open as many as four new Colleges in Mandi District alone; notwithstanding the fact that there were already eight Government Degree Colleges operating in that District, in addition to five private Degree Colleges, which were catering to the requirement of the residents of Mandi District. This clearly shows the ad hoc, lopsided and populist decision taken because of the whims and fancies of the then party in power completely disregarding the need or necessity to open new Government Degree Colleges across the State – where in relative terms it may be more necessary and deserving. The decision of the previous

Government was obviously not need based, but out of political compulsions, which was passed off as a policy decision taken in public interest.

23. Indubitably, decision to open a new GDC must be taken after due deliberations and keeping in mind all the attending circumstances. It cannot be a casual decision - not only because it may have financial ramifications for the State but also result in unhealthy situation affecting quality education imparted to the students of the concerned area, because of lack of infrastructure and proper logistical support, and noncompliance of the high standards specified by the University and University Grants Commission. Ideally, the decision must be backed by a perspective plan reflecting the higher education policy of the State Government to open new Government Degree Colleges across the State commensurate with the need of the area concerned. It must not be a haphazard decision, much less resulting in having cluster of Colleges only in some Districts and denial of that fundamental facility to the aspiring students of other Districts in the State. We may hasten to add that starting of a new GDC cannot be an unplanned expenditure or expenditure required to be incurred in some unforeseen situations or for disaster management as such. It cannot be gainsaid that the expenditure for starting a new GDCwould involve setting up of infrastructure and substantial capital investment as also providing for adequate staffing pattern and other facilities requiring recurring expenditure. When it is a case of planned expenditure, it ought to be in consonance with the policy and action plan of the Government of the day. No doubt, the Executive may have discretion to make modification or variation to such action plan due to compelling circumstances and for correcting some anomaly in the plans noticed at a later stage. That discretion must be exercised by the Executive in public interest and not arbitrarily. An ad hoc decision taken on the spot or because of political compulsions, whilst compromising on the Constitutional obligations of the State of good governance, cannot be countenanced. Indeed, while drawing up the action plan or perspective plan for creating opportunities of higher education across the State, it must necessarily mirror holistic approach and, more particularly, to ensure, as far as possible, equal distribution of resources (budgetary allocation) across the State and prioritizing the spending on need based of the concerned region in the State.

28. From the material on record, as observed earlier, it is more than evident that the decision to open the stated 8 new Government Degree Colleges was not due to compelling need of the concerned area, but due to political compulsions. In that case, the succeeding ruling party was within its right to review the situation and take an objective decision, in public interest. The reasons recorded in the decision taken in the meeting of Cabinet of Ministers, by no stretch of imagination, can be said to be untenable, unreasonable, unrealistic, intangible and replete with political vendetta. None of these factors can be attributed to that decision on the basis of which the impugned orders have been passed to close down the

> *concerned eight Government Degree Colleges in public interest. The decision so taken is backed by the material considered by the Cabinet in the said meeting. As a result, the question of interfering with such decision, that too by way of judicial review thereof, will be completely in excess of writ jurisdiction. It is well established position that the judicial review can be of decision making process and not of the decision of the Executive itself. Thus understood, the challenge to the impugned decisions in the respective petitions will have to be stated to be rejected.*
>
> *52. Even the observations found in another decision of the Apex Court pressed into service in the case of Villianur Iyarkkai Padukappu Maiyam (supra), in paragraphs 167 to 171, which have been reproduced in the earlier part of this judgment, are indicative that the Executive or the Government of the day must work under some policy and not on the basis of sporadic and impromptu announcements made in disregard of the ground reality only for receiving popular accolade."*

The stand of the respondent-State is that in the meeting held on 4.8.2018 under the chairmanship of Hon'ble Chief Minister, the issue of opening of new Colleges announced in the year 2017 including the ones involved in these three writ petitions was deliberated. Factual position was that enrollment of students in these Colleges was either very less or practically nil. The land was also not available for these Colleges. Therefore, it was not considered appropriate to make these newly announced colleges functional in academic session 2018-19. Accordingly, the staff posted for these Colleges was shifted to other Colleges. The proceedings of this meeting have been placed on record of CWP No. 2320 of 2018 by the petitioners therein.

Opening of a Government College is a policy decision of the Government permitting limited scope of judicial review. The respondents did not start the Colleges as the enrollment of the students in these Colleges was very less. College had neither any building/land nor any infrastructure. It is for this reason that respondents did not start the College for the academic year 2018-19. The decision taken in the meeting dated 4.8.218, therefore, cannot be termed as unreasoned, untenable, unrealistic or in contravention to the pronouncement in Dhrub Dev's case *supra.* We have been informed during hearing of the case that as of now no final decision has been taken either regarding making these Colleges functional or closing them. In the meeting chaired by the Hon'ble Chief Minister on 4.8.2018 the decision for not making the Colleges functional was confined to academic year 2018-19. Subsequently on 20.9.2018 *'status quo order'* was passed by the Court. Since no final decision in the matter has yet been taken, therefore, without going further in the matter, we dispose of these writ petitions by vacating the interim order forthwith to enable the respondents to

consider the matter and take appropriate final decision in accordance with law with respect to the Colleges involved in these writ petitions, which were announced in the year 2017.

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

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN. JUDGE AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, JUDGE

1. **CWP No 2503 of 2016**

Hari Prakash .....Petitioner.

Versus

State of Himachal Pradesh & ors. .....Respondents.

2. **CWPOA No. 663 of 2020**

Krishan Pal .....Petitioner.

Versus

State of H.P. & anr. .....Respondents.

CWP No.2503 of 2016 a/w
CWPOA No. 663 of 2020
Reserved on: 02.11.2020.
Decided on: 06 .11.2020.

Constitution of India, 1950- Article 226-Petitioner working Technical Assistant in the Department of Industries retired on 31.3.2003- Whether entitled to the increment which fall on 1st of April 2003- Petitioner Krishan Pal Junior Basic Teacher retired on 29.2.2003 and date of annual increment is 1st March of every year- It was held that the status of petitioner on 1st day of next month when they stood retired is that of pensioner, therefore, no increment can be granted in their favour- Petitioner dismissed.

Cases referred:

Principal Accountant General vs. C. Subba Rao 2005 Lab I.C. 1224;
Kunhayammed and others Vs. State of Kerala and another, (2000) 6 SCC 359;
Khoday Distilleries Limited and others Vs. Sri Mahadeshwara Sahakara Sakkare Karkhane Limited, Kollegal (2019) 4 SCC 376;
Union of India and others Vs. M.V. Mohanan Nair, (2020) 5 SCC 421;
State of Orissa and another Vs. Dhirendra Sunder Das and others, (2019) 6 SCC 270;

For the petitioner : Mr. B. Nandan Vashishta, Advocate for the petitioner in CWP No. 2503 of 2016.

Mr. Rajesh Kumar, Advocate, for the petitioner in CWPOA No. 663 of 2020.

For the respondents : Mr. Ashok Sharma, Advocate General with Mr. Vinod Thakur, Mr. Shiv Pal Manhans, Addl. AGs, Ms. Bhupinder Thakur, Ms. Seema Sharma and Mr. Yudhbir Singh Thakur, Dy. AGs for respondents No. 1,2,4 and 5 in CWP No. 2503 of 2016 & for respondents No. 1 and 2 in CWPOA No 663 of 2020.

Mr. Shashi Shirshoo, CGC, for respondents No. 3 and 6 in CWP No. 2503 of 2016.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, *Judge*

Whether an employee who retired on 31st of a month is entitled to the increment which would have fallen due on 1st of the next month is the question involved in the Civil Writ Petition No. 2503 of 2016.

2. Petitioner was appointed as Technical Assistant in the Department of Industries (Geological wing) on 1.3.1968 in the pay scale of Rs. 250-550. He retired as Senior Hydrogeologist on 31.3.2003 in the pay scale of Rs. 10025-15100(pre-revised). His grievance is that even after rendering twelve months of continuous service from 1.4.2002 to 31.3.2003, he has been retired without giving him the benefit of one increment which was due to him on 1.4.2003. A petition preferred in this regard by the petitioner (T.A No. 530/2015) has been dismissed by the erstwhile H.P. Administrative Tribunal on 8.8.2016. Aggrieved, instant writ petition has been preferred by the petitioner seeking following reliefs:

> "I. To quash Annexure P-10, the order passed by Hon'ble H.P. Administrative Tribunal dated 8.8.2016 whereby the TA of the petitioner has been dismissed without giving due considerations to the grounds raised by the petitioner in TA.
>
> **II. To strike down the offending part of impugned provision of R 56(a) of Fundamental Rules being unconstitutional to the extent it causes undue hardship and is discriminatory to the petitioner as it deprives him from getting the benefit of due and legitimate one increment even after rendering 12 months continuous and uninterrupted service for the reason that his date of birth falls on 1st April which also happens to be his date of next increment.**
>
> III. Or in the alternative, the Respondents No.1 and 2 may kindly be directed to grant necessary relaxations in favour of the petitioner by invoking the provision of FR-5-A as undue recurring financial hardship has been caused to the petitioner in his pension and pensionary benefits and thereby enabling the

petitioner to get the benefits of one increment since the petitioner has already rendered 12 months continuous and uninterrupted service in the time scale of his post but on superannuation, has been illegally deprived of the benefits of one increment due to the wrong interpretation of FR 56(a) by the Respondents, with further prayer to grant consequential necessary benefits flowing therefrom alongwith admissible interest on the arrears accruing thereto".

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

3(i). In support of his claim of the increment immediately falling due post retirement, learned Counsel for the petitioner relied upon a judgment passed by the High Court of Judicature at Madras in WP No. 15732 of 2017, titled *P. Ayyamperumal* vs. *Registrar, CAT* decided on 15.9.2017, wherein it was observed that on completing one year of service from 1.7.2012 to 30.6.2013, the petitioner therein became entitled for the benefit of increment, which accrued to him 'during that period' though the increment fell due on 1.7.2013 when he was not in service. The relevant extract from the judgment is reproduced hereinafter:

> *"6. In the case on hand, the petitioner got retired on 30.06.2013. As per the Central Civil Services (Revised Pay) Rules, 2008, the increment has to be given only on 01.07.2013, but he had been superannuated on 30.06.2013 itself. The judgment referred to by the petitioner in State of Tamil Nadu, rep.by its Secretary to Government, Finance Department and others v. M.Balasubramaniam, reported in CDJ 2012 MHC 6525, was passed under similar circumstances on 20.09.2012, wherein this Court confirmed the order passed in W.P.No.8440 of 2011 allowing the writ petition filed by the employee, by observing that the employee had completed one full year of service from 01.04.2002 to 31.03.2003, which entitled him to the benefit of increment which accrued to him during that period.*
>
> *7. The petitioner herein had completed one full year service as on 30.06.2013, but the increment fell due on 01.07.2013, on which date he was not in service. In view of the above judgment of this Court, naturally he has to be treated as having completed one full year of service, though the date of increment falls on the next day of his retirement. Applying the said judgment to the present case, the writ petition is allowed and the impugned order passed by the first respondent-Tribunal dated 21.03.2017 is quashed. The petitioner shall be given one notional increment for the period from 01.07.2012 to 30.06.2013, as he has completed one full year of service, though his increment fell on 01.07.2013, for the purpose of pensionary benefits and not for any other purpose. No costs."*

The SLP (Civil) preferred against this judgment was dismissed in limine by the Hon'ble Apex Court on 23.7.2018 with following order:

> *"Delay condoned.*

On the facts, we are not inclined to interfere with the impugned judgment and order passed by the High Court of Judicature at Madras. The special leave petition is dismissed."

The review petition against the order dated 23.7.2018 was dismissed on 8.8.2019. Learned Counsel for the petitioner also pressed in service the judgment passed in WP(C) 10509/2019, titled *Gopal Singh* Vs. *Union of India and others,* decided by a Division Bench of High Court of Delhi on 23.1.2020 whereunder relying upon the judgment in P. Ayyamperumal's case *supra* the writ petition was allowed and respondents therein were directed to grant notional increment to the petitioner w.e.f. 1.7.2019 for the service rendered by him from 1.7.2018 to 30.6.2019. The respondents were further directed to re-fix the pensionary benefits of the petitioner.

Relying upon the above judgments, learned Counsel for the petitioner submitted that in the instant case petitioner had rendered continuous service of twelve months on the date of his retirement but he was not granted the benefit of one increment which was due and admissible to him on 1.4.2003.

3(ii) Opposing the petition, on behalf of the State, learned Additional Advocate General placed reliance upon a decision rendered on 29.7.2020 by the Madhya Pradesh High Court in *Madhav Singh Tomar & ors.* vs. *M.P. Power Management Co. Ltd. & ors., (WP No. 9940 of 2020*) wherein relying upon an earlier order passed by a Division Bench of the High Court on 10.7.2017 in writ appeal No. 717 of 2016, the writ petition claiming next annual increment due immediately after retirement was dismissed keeping in view the Fundamental Rules governing service conditions of the petitioner. Reliance was also placed by learned Additional Advocate General upon a Full Bench decision of Andhra Pradesh High Court delivered on 27.1.2005 in ***Principal Accountant General*** vs. ***C. Subba Rao 2005 Lab I.C. 1224*** where the impugned order of the Tribunal holding the employee entitled to an annual increment that fell due on 1.1.2002 after his retirement on 31.12.2001 was quashed and set aside. Relevant extract from the judgment is as under :-

"16. As per F.R. 17, extracted hereinabove, a Government servant shall begin to draw the pay and allowances attached to his post with effect from the date when he assumes the duties of that post until he ceases to discharge those duties. "Pay" as defined in F.R.9(21)(a) means, the amount drawn monthly by a Government servant which also includes the increment given at an anterior date. Therefore, after retirement, a person will not be entitled to any pay including the increment that may be due from the posterior date. F.R.22 regulates the initial pay of a Government servant who is appointed to a post in time-scale and F.R.24 and F.R.26 regulate the sanction of

increment to a Government servant, who is on duty. A reading of various Fundamental Rules extracted hereinabove would show that a person appointed as a Government servant is entitled to pay in time- scale of pay. He is also entitled to draw the increment as per time-scale of pay as a matter of course as long as such Government servant discharges duties of the post and such Government servant shall not be entitled to draw the pay and allowances attached to the post as soon as he ceases to discharge those duties. In other words, as per F.R. 17 read with F.Rs.24 and 26 annual increment is given to a Government servant to enable him to discharge duty and draw pay and allowances attached to the post. If such Government servant ceases to discharge duties by any reason say, by reason of attainment of age of superannuation, such Government servant will not be entitled to draw pay and allowances. As a necessary corollary, such employee would not be entitled to any increment if it falls due after the date of retirement, be it on the next day of retirement or sometime thereafter.

> 17. F.R.56(a) creates a legal fiction. Even if a person attains the age of 60 years on any day of the month, he shall be retired on the afternoon of the last day of the month. A Government servant, who attains the age of 60 years on any day in a month, is deemed to have not attained the superannuation till the last day of the month. In the case of a Government servant, whose date of birth is first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of 60 years. In this case, actually and factually, a Government servant would have completed the age of 60 years a day before the date on which his date of birth falls. Therefore, there are two situations. In the first situation, a Government servant though he attains the age of 60 years on any day of the month, he is deemed to have not attained such age till the afternoon of the last day of that month. Assuming that such a situation is not contemplated - as in the case of persons holding constitutional offices like, Judges of Supreme Court, High Court, Members of Election Commission, Comptroller and Auditor General etc; if a Government servant is retired on a day before the actual date of birth on any day of the month and the increment of such Government servant falls on the first of the succeeding month, can he claim annual grade increment? The answer must be an emphatic "no". Because, by the date on which the increment falls due, such Government servant ceased to be a Government servant. It is therefore logical and reasonable to conclude that merely because for the purpose of F.R.56(a), a person is continued till the last date of the month in which he attains the age of superannuation, such an employee cannot claim increment which falls due on the first day of the succeeding month after retirement."

4(i). Fundamental Rules ('FR' in short) govern all general conditions of service of employees. FR 56 relates retirement of an employee. The relevant part of the Rule 56(a) reads as under:-

F.R. 56(a) *Except as otherwise provided in this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:*

Provided that a Government servant whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty years.

Provided further that a Government servant who has attained the age of fifty-eight years on or before the first day of May, 1998 and is on extension in service, shall retire from the service on expiry of his extended period of service.

Or on the expiry of any further extension in service granted by the Central Government in public interest, provided that no such extension in service shall be granted beyond the age of 60 years."

In terms of FR 56(a), a Government servant retires on the last day of the month in which he attains age of superannuation. In case his date of birth is the first of a month, then he shall retire on the afternoon of the last day of the preceding month on attaining age of superannuation. Petitioner with date of birth as 01.04.1945 had retired from sevice on 31.03.2003 on attaining 58 years of age of superannuation.

4(ii) The day when the government employee retires has to be treated as his last working day. FR 17(1) provides that an officer shall begin to draw pay and allowances attached to the post w.e.f. the date when he assumes duties of that post and shall cease to draw them as soon as he ceases to discharge those duties. The rule reads as under:

*"**F.R. 17(1)** Subject to any exceptions specifically made in these rules and to the provision of sub-rule (2), an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties."*

Rule 5 of CCS Pension Rules says that date of retirement of the person shall be treated as his last working day and his claim to pension shall be regulated by provisions of rules in force at the time of his retirement. The Rule reads as under :-

"5.Regulation of claims to pension or family pension

(1) Any claim to pension or family pension shall be regulated by the provisions of these rules in force at the time when a Government servant retires or is retired or is discharged or is allowed to resign from service or dies, as the case may be.

(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"

Under Rule 83(1) of CCS Pension Rules, pension becomes payable from the date a Government servant ceases to be borne on the establishment. The Rule is extracted hereinafter :-

"83 Date from which pension becomes payable

(1) Except in the case of a Government servant to whom the provisions of Rule 37 apply and subject to the provisions of Rules 9 and 69, a pension other than family pension shall become payable from the date on which a Government servant ceases to be borne on the establishment."

Rule 34 of CCS Pension Rules provides for determination of average emoluments with reference to emoluments drawn by a Government servant during last ten months of the service. Under Rule 33 'emoluments' means basic pay as defined in Rule 9(21) (a) (i) of Fundamental Rules which a Government servant was receiving immediately before his retirement. Rule 33 is as under :-

"33. Emoluments

"The expression `emoluments' means basic pay as defined in Rule 9 (21) (a) (i) of the Fundamental Rules which a Government servant was receiving immediately before his retirement or on the date of his death ; and will also include non-practising allowance granted to medical officer in lieu of private practice.

EXPLANATION. - Stagnation increment shall be treated as emoluments for calculation of retirement benefits."

The petitioner was not on duty on 1.4.2003. Increment can be drawn only when an employee is on duty. The increment in terms of FR 24 & 26 did not become due during the period of service of the petitioner. Therefore, increment on 1.4.2003 cannot be sanctioned in favour of petitioner on the ground that he had completed twelve months of continuous service. The date of increment falls due on the first day of the succeeding month after the retirement. Petitioner retired on the basic pay drawn by him on 31.3.2003 i.e. his date of retirement. His pension has to be determined accordingly. Petitioner had become a pensioner on 1.04.2003. He cannot be held entitled to any increment which may fall due post his retirement. He is entitled only to those increments which fall due to him during the period of his service.

4(iii) Learned counsel for the petitioner contended that in P. Ayyamperumal's case (supra) a direction was issued to the respondents to grant the employee one notional increment for the purpose of pensionary benefits for the period 01.07.2012 to 30.06.2013 as he had completed one full year of service on his retirement on 30.06.2013 even though next increment fell due on 01.07.2013. He further submitted that since the SLP against this judgment was dismissed by the apex Court on 23.07.2018 and review petition was also dismissed on 08.08.2019, therefore, the legal position has now been settled by the apex Court that the increment which falls due on the day immediately following the day of retirement, has to be granted to the employee on the ground that he had completed 12 months of service on the date of his retirement. The aforesaid contention of learned counsel is untenable. It is settled law that an order refusing Special Leave to Appeal may either be a speaking order or the non speaking one. In either case, it will not attract doctrine of merger. In the instant case, the order refusing Special Leave to Appeal is non speaking, therefore, it does not stand substituted in place of the order under challenge. In this regard, it would be appropriate to refer to paragraph 44 of the judgment passed by apex Court in **(2000) 6 SCC 359** titled **Kunhayammed and others** Vs. **State of Kerala and another,** relied upon in (**2019) 4 SCC 376**, titled **Khoday Distilleries Limited and others** Vs. **Sri Mahadeshwara Sahakara Sakkare Karkhane Limited, Kollegal.**

> *"44. To sum up our conclusions are :-*
> *(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.*
> *(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.*
> *(iii) Doctrine of merger is not a doctrine of universal or unlimite application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.*
> *(iv) An order refusing special leave to appeal may be a non- speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order*

refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the apex court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C."

In (**2019) 6 SCC 270,** titled **State of Orissa and another** Vs. **Dhirendra Sunder Das and others**, principle of law was reiterated that dismissal of an SLP in limine without giving any detailed reason does not constitute any declaration of law or a binding precedent under Article 141. The relevant paragraph is reproduced hereinbelow :-

> "9.27 It is a well settled principle of law emerging from a catena of decisions of this Court, including Supreme Court Employees' Welfare Association v. Union of India & Anr. (1989) 4 SCC 187 and State of Punjab v. Davinder Pal Singh Bhullar (2011) 14 SCC 770, that the dismissal of a S.L.P. in limine simply implies that the case before this Court was not considered worthy of examination for a reason, which may be other than the merits of the case. Such in limine dismissal at the threshold without giving any detailed reasons, does not constitute any declaration of law or a binding precedent under Article 141 of the Constitution".

In **(2020) 5 SCC 421,** titled **Union of India and others** Vs. **M.V. Mohanan Nair**, it was held that the law declared by the Supreme Court has to be essentially understood as a principle laid by the Court and it is this principle which has the effect of a precedent. A principle can be delivered only after examination of the matter on merits and not on the basis of a decision delivered on technical grounds without entering into the merits at all. A decision unaccompanied by reasons cannot be said to be a law declared by the Supreme Court though it will bind the parties inter se

in the litigation. The relevant paragraph of the judgment (supra) is reproduced hereinbelow :-

> *"48. Article 141 of the Constitution of India provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India, i.e. the pronouncement of the law on the point shall operate as a binding precedent on all courts within India. Law declared by the Supreme Court has to be essentially understood as a principle laid down by the court and it is this principle which has the effect of a precedent. A principle as understood from the word itself is a proposition which can only be delivered after examination of the matter on merits. It can never be in a summary manner, much less be rendered in a decision delivered on technical grounds, without entering into the merits at all. A decision, unaccompanied by reasons can never be said to be a law declared by the Supreme Court though it will bind the parties inter-se in drawing the curtain on the litigation. In Union of India v. All India Service Pensioners' Association and another (1988) 2 SCC 580, the Supreme Court held that "when reasons were made by the Supreme Court for dismissing the SLP, the decision becomes one which attracts Article 141 of the Constitution which provides that the law declared by the Supreme Court shall be binding on all the courts within the territory of India."*

Therefore, it cannot be said that by dismissal of SLP against the judgment rendered in P. Ayyamperumal's case (supra), the apex Court had laid down the binding principle of law that increment which falls due on first day post the retirement of an employee is to be granted to him only for the reason that he had rendered 12 months of service on the day of his retirement.

Learned Tribunal rightly held that power to relax requirement of a rule, provided under F.R.5-A can be exercised only in consonance with the rule and not in a routine manner. Petitioner had retired on 31.03.2003. It was in 2014 that he moved representations seeking claim on the increment which would have fallen due on 01.04.2003. We have already held that petitioner had retired on 31.03.2003 on the basis of pay drawn by him on that date. His status as on 01.04.2003 was that of a pensioner. Therefore, increment which fell on 01.04.2003 cannot be granted in his favour.

No other point was urged by the learned counsel.

For the foregoing reasons, we find no merit in the present writ petition and the same is accordingly dismissed. Pending applications, if any, also stand disposed of.

CWPOA No. 663 of 2020

The petitioner, a Junior Basic Teacher, with 01.03.1958 as his date of birth was due for superannuation on 29.02.2016. The date of his annual increment was 1st March of every year. He being a State awardee was granted an extension of one year in service in light of State Government instruction, dated 30.11.2015. After availing the extended service, petitioner superannuated on 28.02.2017. His representation requesting one day extension in service has been rejected. Hence he has preferred instant writ petition to claim increment which fell on 01.03.2017. Point involved is covered by the discussions made above. This writ petition is, therefore, also dismissed. Pending applications, if any, also stand disposed of.

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

Ashraf Ali ...Petitioner

Versus

Kamlesh Kumar Pant & another ....Respondents

COPCT No. 1145 of 2020
Date of Decision 23rd Nov.,2020

Constitution of India, 1950- Article 226- Petitioner made representation before the erstwhile Tribunal and respondent was directed to act in accordance with law- The competent authority disposed of the representation with some observations- The Director of Technical Education, Vocational and Industrial Training HP by passing final order has rejected the claim of petitioners- It was held that petitioner has to assail the order before competent forum- Petition disposed of with liberty to file petition for redressal of his grievance.

For the Petitioner: Mr. Adarsh K. Vashista, Advocate through Video Conferencing.

For the Respondents: Mr. Raju Ram Rahi, Deputy Advocate General, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

The Erstwhile Tribunal vide order dated 15th March, 2017 passed in OA No. 720 of 2017 titled Ashraf Ali vs. State of HP and another had directed the respondent/competent authority to consider and decide the representation of petitioner in accordance with law as expeditiously as possible, but, not later than three months from the date of production of certified copy of order before the said authority by applicant.

2 In sequel to aforesaid order, the competent authority had passed order dated 30.6.2017, but, instead of deciding the claim of petitioner either way, representation was disposed of with observations that representation of petitioner could not be decided at that stage by the Department to avoid further litigation and contempt of Hon'ble Court in view of pendency of OA Nos. 3547 of 2016 and 5094 of 2016, which were registered as CWPOA No. 51 of 2019 and connected matters, after the receipt of record from Tribunal in the High Court on closure of Erstwhile Tribunal.

3 CWPOA No. 51 of 2019 along with connected matter has been decided on 10th July, 2020 and allowed by directing the respondents not to consider the corrigendum dated 8.9.1988 as published in the official Gazette on 24.09.1988 for the purpose of making promotions to the post of Group Instructors.

4 Now, the representation of petitioner has been decided finally by passing a fresh order dated 13th October, 2020 by Director of Technical Education, Vocational and Industrial Training, Himachal Pradesh, whereby claim of petitioner has been rejected.

5 Vide order dated 15th March, 2017, for violation whereof present contempt petition has been filed, the claim of petitioner has not been adjudicated on merits. Now, the representation of petitioner has been decided and rightly or wrongly, it stands rejected by concerned authority. Therefore, the appropriate course available with petitioner is to assail the said order by filing an appropriate petition before the competent Forum.

6 In aforesaid facts and circumstances, present petition is closed and disposed of with liberty to petitioner to file an appropriate petition before competent Court of law for redressal of his grievances including assailing the order dated 13th October, 2020, whereby his claim stands rejected.

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

Veerta Devi and another ....Petitioners.

Vs.

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

CWP No. 4337 of 2020
Date of Decision: 01.12.2020

Constitution of India, 1950- Article 226- Himachal Pradesh Cooperative Societies Act, 1968- Sections 93,94- Appeal preferred under Section 93 dismissed by Appellate Authority, vide impugned order dated 30.7.2020- Impugned order challenged by way of writ petition- Held, that once appeal under Section 93 culminates into an order, the State Government has the power of

revision under section 94 (1) of 1968 Act and writ petition is premature having preferred without exhausting revisional jurisdiction- Petition dismissed. (Para 4, 5).

For the petitioners: Mr. Ajay Sharma, Senior Advocate, with Ms. Anandita Sharma, Advocate.

For the respondents: Mr. Suesh Raj, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals, with Ms. Divya Sood, Deputy Advocate General, for respondents No. 1, 2 & 6.

Mr. B.C. Negi, Senior Advocate, with Mr. Surinder Saklani, Advocate, for respondents No. 4 and 5.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

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

> *"(a) That impugned orders dated 30.07.2020 passed by respondent No. 3 available in Annexure P-6 may very kindly be quashed and set aside with directions to respondents No. 2, 3 and the proforma respondent herein, i.e., Assistant Registrar, Cooperative Societies, Nurpur, to look into the matter as per provisions of the Ac and Rules and allow joining to the petitioners as Secretary and Salesman, respectively, in respondent No. 5-Society.*
>
> *(b) That respondent No. 1 or in the alternative, learned Chief Secretary of the State of H.P. may very kindly be directed to hold an inquiry or get it conducted against respondent No. 3 for misconduct as per provisions of service jurisprudence and take action accordingly and file Action Taken Report on the records of proceedings of this case.*
>
> *(c) That incumbents managing the affairs of respondent No. 5-Society may very kindly be banned from participating in the affairs of the Cooperative Societies, particularly respondent No. 5-Society, for the period as is deemed fit by this Hon'ble Court and they be fined heavily in terms of money as is deemed fit by this Hon'ble Court to be recovered from them and paid to the petitioners.*

2. It is not in dispute that impugned order dated 30.07.2020 is an order, which has been passed by the Appellate Authority, in exercise of powers conferred under Section 93 of the Himachal Pradesh Co-Operative Societies Act, 1968 (hereinafter referred to as 'the 1968 Act'). This Court is of the view that this petition is premature, as there is a statutory remedy available to the petitioners under Section 94 of the 1968 Act against the order which has been so passed by the Appellate Authority under Section 93 of the 1968 Act, who happens to be the Additional Registrar, Co-operative Societiesexercising powers of Registrar under Section 93.

3. Learned Senior Counsel appearing for the petitioners, while relying upon the statutory provisions of Section 94 of the 1968 Act (*supra*), has strenuously argued that there is no statutory remedy available against an order passed in an appeal by the Appellate Authority under Section 93 of the 1968 Act, as the language of Section 94(1) is explicit that revisional power has been conferred upon the State Government in cases 'except in a case in which an appeal is preferred under Section 93". On the strength of said statutory language of Section 94(1), Mr. Sharma argued that because in the present case, an appeal stood preferred under Section 93 by the petitioners, the power of revision, does not vests with the State Government and the petitioners have rightly approached this Court in writ jurisdiction under Article 226 of the Constitution of India.

4. In my considered view, the contention of learned Senior Counsel for the petitioners cannot be accepted. Section 94(1) of the 1968 Act is to the effect that the State Government, except in a case in which an appeal is preferred under Section 93, may call for and examine the record of any inquiry or inspection held or made under this Act or any proceedings of the Registrar or of any person subordinate to him or action on his authority and may pass thereon such orders as it thinks fit. Thus, what Section 94 envisages is that in a case where an appeal is preferred under Section 93 of the 1968 Act, State Government cannot simultaneously exercise its power of revision so conferred under Section 94 of the 1968 Act. However, the language of Section 94 cannot be construed that an order which stands passed by the Appellate Authority in an appeal preferred under Section 93 of the 1968 Act is also not revisable. Had that been the intent of the Legislature, then the language of Section 93 would have been explicit that the State Government cannot exercise the power of revision in a case in which an order stands passed in an appeal preferred under Section 93 of the 1968 Act. Further, in my considered view, once an appeal is preferred under Section 93 of the 1968 Act and the same culminates into an order passed by the Registrar, then the State Government has the power of revision, because then the adjudication of the appeal becomes 'any proceedings of the Registrar' and these proceedings are revisable as per statutory provisions of Section 94(1) of the 1968 Act.

5. Accordingly, this writ petition is dismissed on the ground that the petitioners have approached this Court without exhausting statutory revisional jurisdiction. As the writ petition is dismissed on technical grounds, in the interest of justice, it is observed by this Court that in the event of the petitioners approaching the Revisional Authority within a period of 30 days from today against the order passed by the Appellate Authority under Section 93 of the 1968 Act, which stands impugned by way of this writ petition, then the Revisional Authority shall treat the revision to be filed within limitation and decide the same on merit. It goes without saying that such revision petition, if any, preferred shall positively be decided by the Revisional Authority, after affording reasonable opportunity of being heard to all the parties, within a period of two months from the date of filing of the revision petition. Miscellaneous applications, if any, also stand disposed of.

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

Tarun Kumar. ...Petitioner.

Versus

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

CWPOA No. 96 of 2019
Reserved On: 29.10.2020
Date of decision: 26.11.2020

Constitution of India, 1950:- Article 226- Notification of Police Department, District Kullu, for appointment to 6 posts of constables (Driver) i.e 3 posts for general and one post each for S.C (Ex-Servicemen), ST (Antodaya/IRDP) & OBC (Antodaya/IRDP)- No post under SC (General)- Application of petitioner to consider his candidature for the post of constable (driver) general category as there was no post in SC (General) category which was accepted- District recruitment Committee (DRC)on conclusion of recruitment process selected respondent No.5 to the post of constable (driver) in SC(General) category- Post of constable (driver) in sub category of SC (IRDP) was dereserved and made available for SC (General) category during selection process- Held, that entertainment of application of respondent No.5 during selection process illegal- Post becoming available in residuary SC (General) category was required to be notified again which was not done- Selection of respondent No.5 to the post of constable (driver) in the category of SC (general) quashed- Petition allowed. (Paras 2,3,20,22, 23).

For the Petitioner: Mr.L.N. Sharma, Advocate, through Video Conferencing.

For the Respondents: Mr.R.P. Singh and Mr.Raju Ram Rahi, Deputy Advocates General, for respondents No. 1 to 4, through Video Conferencing.

Ms.Ranjana Parmar, Senior Advocate with Mr.Karan Singh Parmar, Advocate, for respondent No. 5, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Petitioner has approached this Court for quashing of selection of private respondent No. 5 for appointment to the post of driver under Scheduled Caste category in Police Department in District Kullu, H.P. and for directions to respondent-Department to conduct fresh interview to the said post by calling eligible qualified candidates including the petitioner to select a genuine candidate to the said post.

2. Undisputed facts in present case are that vide Compulsory Notification dated 12.7.2017, (Annexure R-1 to the reply of respondents-Department), Police Department had notified for recruitment 50 posts of General Duty Constables (Male), 13 posts of General Duty Constables (Female) and 6 posts of Constables (Male) (Driver), in accordance with roster point applicable to the said vacancies, as per vertical and horizontal reservation. In this notification, eligibility condition with respect to age, educational qualification, height and chest, criteria of awarding marks in Physical Standard Tests, minimum qualifying standard in qualifying Physical Efficiency Test and scheme of marks in Written Test was also notified with note that cut of date, for calculation of upper and lower age and reserved category certification limit, was 1.7.2017. Upper age limit for General Category Candidate was 23 years, whereas the same for SC, ST, OBC and Gorkhas was 25 years and for candidates from Home Guards it was 28 years.

3. In present case issue with respect to appointment to the post of Constable (Driver) from SC Category is in question. Therefore, breakup of the posts of Constables (Driver) is relevant to be reproduced. At the first instance on 12.7.2019, 6 posts of Constables (Driver) were notified and out of these 6, 3 posts were available for general category and one post each was available for SC (Ex. Servicemen), ST (Antodaya/IRDP) and OBC (Antodaya/IRDP). There was no post available under the SC (General) Category; rather post was available only under its sub-category i.e. SC (Ex. Servicemen).

4. On 14.7.2017 vide Annexure R-3 to the reply of respondents-Department, Police Department, District Kullu had notified left out 16 posts of Constables General Duty (Male), 3 posts of Constables General Duty (Female) and 3 left out posts of Constables (Male) (Driver). Out of these 3 posts of Constables (Male) (Driver), 2 posts were available under general sub categories i.e. one each for general (ex servicemen) and general (wards of freedom fighters) and 3rd post was available in sub category of SC i.e. SC (Antodaya/IRDP).

5. As observed herein above, for the post of Constables (Driver), total 9 posts were notified and breakup of these 9 available posts is as under:-

General	=3 posts
General (ex servicemen)	=1 post
General (WFF)	=1 post
SC (Ex servicemen)	=1 post
SC (Antodaya/IRDP)	=1 post
ST (Antodaya/IRDP)	=1 post
OBC (Antodaya/IRDP)	=1 post

As evident from breakup, there was no post of Constable (Driver) (Male) notified in the SC (General) category.

6. Last date for submission of applications was 21.7.2017 and the said applications had to reach in the office of Superintendent of Police, District Kullu by 5:00 P.M. through any mode, including by post. It was notified that any application form not received by last date fixed for receipt of applications, will not be entertained.

7. Petitioner and respondent No. 5 belong to SC (General) category. On 17.7.2017, petitioner had submitted an application, Annexure R-2 to the reply of respondent-Department, with prayer to consider his candidature against the post notified for Constable (Driver) in General category for the reason that there was no post available in SC (General) category. His application was accepted by the authorities and he was permitted to participate in the selection process.

8. Respondent No. 5 had applied to the post of Constable (General Duty) in the category of SC (General) category. Respondent No. 5 had completed his age of 23 years on 1.7.2017 and, therefore, he was not eligible to be considered against the post notified in the General category. Whereas, petitioner was below 23 years and thus was having right to be considered against General category on the basis of his merit.

9. On finding petitioner and respondent No. 5 eligible, they were called for physical efficiency test. In pursuance to the said call, they had appeared in physical efficiency test, conducted in August, 2017 on respective dates fixed for the said purposes and on qualifying physical efficiency test, they were called for written examination and in the written examination, petitioner as well as respondent No. 5 had scored 37 marks each.

10. As per reply of respondents-Department, minimum qualifying marks for general (unreserved) category were 50% of the total i.e. 40 marks, out of total 80 marks. As the petitioner had applied under general (unreserved) category, therefore, he was considered unqualified. It would be apt to notice at this stage that no such minimum qualifying marks in the written examination have been notified in compulsory notifications dated 12.7.2017 and

14.7.2017. It is also not clarified in the reply that what were minimum qualifying marks for reserved categories.

11. After written examination, suitability-cum-personality test was conducted by District Recruitment Committee (for short 'DRC') w.e.f. 7.5.2018 to 10.5.2018.

12. DRC had completed selection process on 10.5.2018 and proceedings of DRC, dated 10.5.2018 have also been placed on record as Annexure R-5 by respondents-Department. On conclusion of recruitment process, respondent No. 5 was declared to have been selected to the post of Constable (Driver) in SC (General) category.

13. It is case of the respondents-Department, as also stated in proceedings of DRC, that interview for the post of Constables (Driver) reserved for SC (Ex-servicemen) was not conducted as name for the post reserved for SC (Ex-servicemen) was to be sponsored by the State Selection Committee, Sub Regional Employment Office, Ex-servicemen Cell, Hamirpur. Against 3 posts of constables (driver) of general (unreserved) category, only 2 candidate were available for interview and no candidate was available for the one post of Constables (Driver) reserved for SC (IRDP) and, therefore, the said post was de-reserved to SC (General) category and only one candidate of SC (General) category, who had qualified the written test was interviewed against the said post. For purpose of clarity it would be apt to mention here that this candidate was respondent No. 5 who had applied to the post of Constable (General Duty).

14. For justifying the action of respondents-Department, appointing respondent No. 5 against the post of Constable (Driver) under SC (General) Category, reliance has been placed on a communication dated 20.11.2013, Annexure R-4 to the reply of respondents-Department, issued by Additional Chief Secretary (Home) to the Government of Himachal Pradesh to Director General of Police, wherein it has been clarified that in case of non-availability of BPL/IRDP candidate against the post reserved for such candidate, such, post will be automatically de-reserved in the first recruitment year itself and be filled up from the candidates of respective residuary category to which the point belongs. There is no dispute with respect to clarification conveyed vide aforesaid letter dated 20.11.2013, but in the facts and circumstances of the present case, the procedure adopted by the respondents-Department is not sustainable in the eye of law for the discussions hereinafter.

15. In Compulsory Notifications dated 12.7.2014 and 14.7.2014, no post of Constables (Driver) was notified to be filled from the SC (General) category. Therefore, there was no occasion for anybody belonging to the said category, including the petitioner as well as respondent No. 5, to apply to the post of Constables (Driver) under SC (General) category. The post was available only for the category of SC (IRDP) and, therefore, on the last date of submissions of application, i.e. 21.7.2017, there was no application in the residuary category

i.e. SC (General). Admittedly, neither petitioner nor respondent No. 5 belongs to sub category of SC (IRDP).

16. Petitioner had applied to the post of Constable (Driver), available for General (unreserved) category, for the reasons that there was no post available under the SC (General) category. Whereas, respondent No. 5 had applied to the post of Constables (General Duty) available of SC (General) category.

17. No application after 21.7.2017 was to be entertained. Till last date, respondent No. 5 had not applied to the post of Constable (Driver) and in fact he could not have applied, for the reasons that he was not belonging to the sub category IRDP in residue SC category for which the post of Constable (Driver) was available and he was not eligible to be considered to the post of Constable (Driver) notified under General (unreserved) category, as he had crossed the maximum age limit provided for the said category whereas petitioner was within age limit prescribed for General category candidates. Therefore, on the last date of submission of applications, petitioner was competing for the post of Constable (Driver) notified for General (unreserved) category, whereas respondent No. 5 was competing to the post of Constable General Duty. Thus consideration of candidature of respondent No. 5 for the post of Constable (Driver) against SC (General) category, which became available after 21.7.2017, i.e. after last date for submitting applications, is an act which is not permissible under law as well as in terms of conditions notified in Compulsory Notifications dated 12.7.2017 and 14.7.2017.

18. In sequel to clarification dated 20.11.2013, the post of Constable (Driver) in the sub category of SC (IRDP) was de-reserved and thus became available in respective residuary category i.e. SC (General), during selection process but after last date of receipt of application and thus no one from the SC (General) category was able to apply for the said post. Vide communication dated 22.12.2018, respondents-Department has disclosed to the petitioner by supplying information under the Right to Information Act, that respondent No. 5 had submitted an application during process of Physical Efficiency Test, requesting therein that he had valid license and wanted to fight for the post of driver. Physical Efficiency Test was conducted in August, 2017. Entertainment of such application during process of physical efficiency test, i.e. in August, 2017, after 21.7.2017, i.e. notified last date for receipt of applications, is an illegal act on the part of concerned authority/Department.

19. There is no defect in the clarification dated 20.11.2013, but the same would be applicable in the circumstances when at least one post under residuary category has also been notified, enabling the candidates of residuary category, desirous for the said post, to apply for the said post, so that when a post notified for sub category becomes available as an additional post to the residuary category for non-availability of candidate in the sub category, the

candidates, who apply for the post available in residuary category, are available to be considered and selected against the said additional post falling to residuary category.

20. In present case, there was no post notified in residuary category, i.e. SC (General) and, therefore, there was no applicant available with the Department to be considered under residuary category, i.e. SC (General) and, therefore, in such eventuality the post becoming available in residuary SC (General) category was required to be notified again in the SC (General) category. The respondents-Department was not having any right to entertain the application of respondent No. 5 after the last date notified for that and also to convert his application submitted by him for considering his candidature for Constable (General Duty) into an application to the post of Constable (Driver) under SC (General) category, which post was not available on the last date of submission of application form.

21. A course, which would perhaps had enabled the concerned authority to contend its bonafide intention, would have that immediately after availability of post for SC (General) category on de-reservation from sub category of SC (IRDP), the said post would have, at least, notified to all candidates of SC (Category) particularly in the process either against the post of Constable (Driver) General (unreserved) category or Constable (General Duty) SC category or any other post but belonging to SC (Category) including petitioner and respondent No. 5 to give them a chance to apply subject to their eligibility. Though such procedure would also have deprived those who had not applied under SC (General) category to the post of driver for non-availability of post but to some extent it would have helped the authority to justify bonafide intention of adopting fair procedure providing lesser probability of interference by the Court.

22. It was categorically stated by the petitioner in his application dated 17.7.2017 that he was applying for the post of Constable (Driver) notified for the General Category (unreserved) for non-availability of post of Constable (Driver) in the category of SC (General), therefore, his application to consider his candidature to the post of Constable (Driver) under the General (unreserved) category was under compulsion and in case it would have been in the knowledge of petitioner that there was no candidate available in SC (IRDP) category and the said post was available in residuary category i.e. SC (General) category and the application for that available post was being entertained by the respondents-Department even after last date, i.e. 21.7.2017, then definitely petitioner would have an occasion to decide as to whether he was interested to be considered against the said post being made available under the residuary category i.e. SC (General) or to continue competing for the post available in General (unreserved) category. The respondents-Department has neither notified in general nor to the candidates who had participated in the selection process, with respect to availability of post of Constable

(Driver) in the residuary category i.e. SC (General). Therefore, entertainment of application of respondent No. 5, in aforesaid facts and circumstances, is arbitrary and violative of Article 14 of the Constitution of India.

23. In the facts and circumstances of the present case, for discussion hereinabove, recommendation and selection of respondent No. 5 to the post of Constable (Driver) in the category of SC (General) is quashed and set aside with direction to the respondents-Department to notify the vacancy of Constable (Driver) in SC (General) category again and to fill up the post by adopting the procedure prescribed for that. The necessary process be initiated on or before 31.12.2020 and be completed at the earliest, preferably within three months thereafter. It is made clear that if other posts are also available, the process for the post in question be initiated collectively along with the process for those posts within the time stipulated herein above.

The petition is allowed and disposed of in the aforesaid terms.

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

Mohinder Chand ...Petitioner.

Versus

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

CMPMO No.598 of 2019
Date of Decision: November 10, 2020

Code of Civil Procedure, 1908- Section 152- Award passed under section 18 of Land Acquisition Act, 1984 by referencee court- Landowner held entitled for interest from the date of notification under Section 4 but mentioned incorrect date- Application for correction/ rectification of date of publication of notification dismissed on the ground that proceedings are stayed by High Court- Held, staying of execution and operation of impugned judgment in appeal does not disentitle the referencee Court from rectifying clerical/typographical error- Petition allowed- Matter remanded back to the referencee court to rectify error. (Paras 7,8,13)

For the Petitioner: Mr.B.S. Chauhan, Senior Advocate, alongwith Mr.Munish Dhatwalia, Advocate, through Video Conferencing.

For the Respondents: Mr. Raju Ram Rahi, Deputy Advocate General, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (Oral)

This petition has been filed by the landowner against order dated 22.08.2019, passed by learned Additional District Judge-(I), Shimla, H.P., in Civil Miscellaneous Application

No.11-S/6 of 2018, titled as *Mohinder Chand vs. State of Himachal Pradesh & another,* whereby application preferred by the landowner under Section 152 of the Code of Civil Procedure (in short 'CPC') for amendment/rectification of clerical mistake in award/judgment dated 10.11.2017 passed by the said Court in LAC Petition RBT No.2-S/4 of 2016, titled as *Mohinder Chand vs. State of Himachal Pradesh & another,* has been dismissed.

2. Being aggrieved by determination of compensation by the Land Acquisition Collector, landowner Mohinder Chand had preferred Reference Petition under Section 18 of Land Acquisition Act, 1894 (hereinafter referred to as the 'Act'), which has been decided on 10.11.2017 by granting following reliefs:-

> "37. In view of my findings on aforesaid issues, reference petition is succeeded and is hereby answered. The petitioner is held to be entitled for enhancement of compensation of land @ `19,196/- per square meters and `3,78,187/- on account of `5 apple plants. Besides this, the petitioner is also entitled for statutory benefits which are as under:-
>
> a) he shall be entitled to solatium at the rate of 30% per annum on the enhanced market value of the land assessed herein above;
>
> b) he shall also be entitled to additional compensation @ 12% per annum under section 23(1A) of the Act from the date of notification under Section 4 of the Act, till the date of award made by the Collector i.e. 20.08.2011 and
>
> c) he shall be entitled to interest on market value assessed under section 23(1) of the Act, solatium, the additional acquisition charges worked out under Section 23 (1A) of the Act @ 9% per annum from 20.08.2011 to 19.08.2012 i.e. for the period of one year and @ 15% per annum from 19.08.2012 till the amount payment/deposit of the amount of compensation as assessed above in the court."

3. In Clause (c) of the relief, learned Additional District Judge has held that landowner shall be entitled to the interest on market value under Section 23(1A) of the Act @ 9% per annum from 20.08.2011 to 19.08.2012, which was payable to the landowner under Section 28 of the Act from the date of taking over possession of the land.

4. It is settled position that in the case, like present one, possession for the purpose of acquisition has to be taken from the date of issuance of notification under Section 4 of the Act. It is also settled that date of last publication of notification issued under Section 4 of the Act is the relevant date of publication of the said date for this purpose.

5. It is apparent from record that in present case, notification under Section 4 of the Act was issued on 25.07.2008, which was published in the State Rajpatra on 27.08.2008 and in two daily News Papers i.e. Indian Express and Dainik Bhaskar on 08.08.2008 and lastly,

public notices were circulated in the locality on 23.10.2008. Therefore, relevant date of last publication of notification under Section 4 of the Act is 23.10.2008.

6. The Reference Court in its Award in para 35 itself has held that landowner is entitled for interest from the date of notification under Section 4(1) of the Act but has mentioned incorrect date i.e. 28.07.2008. It is an undisputed fact that last date of publication of notification under Section 4 of the Act, in present case, is 23.10.2008. Therefore, relevant date, as evident from record, from which landowner has been entitled for interest is 23.10.2008.

7. Application filed by the petitioner has been dismissed, on the ground that proceedings have been stayed by the Hon'ble High Court of Himachal Pradesh and whole of the amount stands deposited on 30.04.2019 in Appeal before the High Court and, therefore, Reference Court has no power to make any amendment/rectification in the impugned judgment. In my opinion, staying of execution and operation of the impugned judgment in Appeal does not dis-entitle the Reference Court from rectifying its clerical/typographical mistake/error.

8. The Reference Court has committed a mistake by holding that staying of execution and operation of the impugned Award by the High Court in an appeal preferred by either party, dis-entitles the Reference Court from correcting clerical or arithmetical error.

9. Another ground, cited for dismissing the application is that mistake/error pointed out in the application does not seem to be a clerical and arithmetical error and further that Reference Court has passed impugned award very diligently and elaborately and the interest, as mentioned in the award, is correct and according to the Reference Court, petitioner was aggrieved by rate of interest and the period or date, from which it has been granted and, therefore, application has been dismissed with liberty to petitioner to agitate it the appeal (RFA).

10. Findings returned by the Reference Court that mistake pointed out by the petitioner does not appear to be clerical or arithmetical error is also factually incorrect.

11. In para-18 of the Award date of issuance of notification under Section 4 of the Act has been mentioned as 25.07.2008 and in para-35 of the award date of notification under Section 4 of the Act has been mentioned as 28.07.2008. Reference Court in para-35 of the Award has mentioned it as 28.07.2008 and at the time of granting relief instead of this date the Reference Court has mentioned the date from which landowner shall be entitled for interest under Section 28 of the Act as 20.08.2011. Whereas last date of publication of notification under Section 4 of the Act, is 23.10.2008.

12. Reference Court, in para 35, in principle has decided that landowner shall be entitled for interest from date of notification under Section 4 of the Act. On perusal of record, as discussed supra, it is evident that there is clerical error/typographical error in mentioning

the relevant date, which should have been rectified by the Reference Court under Section 152 of CPC.

13. In view of above, present petition is allowed and disposed of and impugned order dated 22.08.2019, passed by learned Additional District Judge-(I), Shimla, H.P., in Civil Miscellaneous Application No.11-S/6 of 2018, titled as *Mohinder Chand vs. State of Himachal Pradesh & another,* is set aside and it is observed that for extending statutory benefit under the Act the date of publication of notification issued under Section 4 of the Act, i.e. last date of publication 23.10.2008 shall be relevant date and, therefore, matter is remanded back to the Reference Court with direction to rectify the error in para-35 as well as in para-37 of the impugned award, in aforesaid terms on or before 31.12.2020.

14. Parties are directed to obtain correct certified copy of award and place it on record of Appeal i.e. RFA No.381 of 2018 pending in this Court.

15. Copy of this judgment be transmitted to the Reference Court with original record summoned in RFA No.381 of 2018 enabling it to comply with the direction. After carrying out necessary corrections record shall be remitted by the Reference Court to this Court for adjudication of RFA No.381 of 2018.

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

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

Sumit Kumar .....Petitioners

Versus

Avneet Patyal and others .....Respondents

CMPMO No.544 of 2017
Judgment reserved on: 13.10.2020
Date of Decision: 16 .10.2020

Code of Civil Procedure, 1908-Order 39 Rules 1& 2-Plaintiff filed suit for specific performance claiming that Defendants no. 1 &2 agreed to sell the suit land in his favour vide agreement to sell dated 26.9.2012- Original agreement to sell not placed on record- No pleadings regarding its misplacement or loss- Defendants No.4 to 7 admittedly in possession of suit land having purchased the same- Held, temporary injunction is equitable relief- Plaintiff failed to approach the court with clean hands and intentionally suppressed material facts to obtain interim order- Three ingredients i.e prime facie case, balance of convenience, irreparable loss and injury not in favour of plaintiff- Petition dismissed. (Paras 9,10,15,18, 19)

Cases referred:

Dalpat Kumar vs. Prahlad Singh, (1992) 1 SCC 719;
M/S Gujarat Bottling Co.Ltd. & Ors. v. The Coca Cola Co. & Ors., AIR 1995 2372;
Mahadeo Savlaram Shelke v. The Puna Municpal Corpn., J.T. 1995(2) S.C. 504;
Roshan Lal versus Ratto , AIR 1977, Himachal Pradesh 10;
Gujarat Bottling Co. Ltd. vs. Coca Cola Co., (1995) 5 SCC 545;
Agriculture Produce Market Committee, Gondal and ors. vs. Girdharbhai Ramjibhai Chhaniyara and ors., (1997) 5 SCC 468;

For the Petitioner: Mr. Sanjeev Kuthiala, Senior Advocate with Ms. Anaida Kuthiala, Advocate, through video-conferencing

For the Respondents: Mr. Ramakant Sharma, Senior Advocate with Mr. Neel Kamal Sharma, Advocate, through video-conferencing.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Being aggrieved and dissatisfied with the judgment dated 15.11.2017 passed by learned District Judge, Hamirpur, District Hamirpur, H.P., in Civil Misc. Appeal No.14 of 2015, affirming the order dated 9.4.2015 passed by learned Civil Judge (Junior Division) Court No.II, Hamirpur, H.P., in CMA No.25 of 2015 in Civil Suit No.17 of 2015, whereby an application having been filed by the applicant *(hereinafter referred to as the plaintiff)* under Order 39 Rules 1 and 2 CPC, restraining the respondents *(hereinafter referred to as the defendants)* from changing the nature of the suit land or raising any construction and laying passage or road over the land in suit, came to be rejected.

2. Precisely, the facts of the case as emerge from the pleadings adduced on record by the respective parties are that the plaintiff filed a Civil suit under Sections 9, 26 Order 7 Rule 1 & 2 of Code of Civil Procedure read with Sections 38 and 39 of Specific Relief Act, for permanent prohibitory injunction and in alternative for mandatory injunction for possession against the defendants. Plaintiff averred in the suit that land comprised in Khata No.99min, Khatauni No.179min, Khasra No.283/2/1 area 95.00 Sq.Mts, Khasra No.283/1/3, area 271.17 Sq.Mts, Kita-2 in total area 366.17 Sq.Mts, situate in Tika Up Mahal Lalhri, Mauza Bajuri, Tehsil and District Hamirpur, H.P *(hereinafter referred to as the suit land),* is owned and possessed by the plaintiffs alongwith other co-sharers as per jamabandi for the year 2011-12. Plaintiff averred that defendants with an object to grab the suit land are threatening to cause interference, destroying the boundaries, removing earth/soil and digging the suit land by using JCB machine, changing its nature and raising forcible construction over the suit land to which they have no right, title or interest as they are strangers to the suit land. Alongwith the aforesaid suit, plaintiff also filed an application under Order 39 Rule 1 and 2 CPC, praying therein to restrain defendants from changing the nature of the suit land during the pendency of

the suit. Plaintiff averred in the suit that defendant No.1 and 2 agreed to sell land/area of 154 Sq.Mts. at Rs.70,000/- per marla as per agreement to sell dated 26.9.2012 and it was undertaken by them to execute sale deed after partition. Plaintiff averred that since defendants No.1 and 2 alongwith other co-sharers have entered into a private partition and thereafter mutation of partition has been sanctioned in their favour, he is entitled to Specific performance of the agreement to sell dated 26.9.2012. Plaintiff claimed that he is still ready and willing to perform his part of the agreement, but defendants No.1 and 2 have failed to perform their part of agreement in order to deprive the plaintiff from his right and further alienated the land to defendant No.3, who has further executed sale deed in favour of defendants No.5 and 6 and defendants No.5 and 6 exchanged the land with defendant No.7 just to multiply the proceedings.

3. Aforesaid claim of the plaintiff came to be resisted on behalf of the defendants, who besides raising objection with regard to maintainability, cause of action and estoppel, has specifically denied the factum with regard to agreement to sell, if any, executed on 26.9.2012. Defendants No.1 and 2 claimed that the agreement dated 26.9.2012 is result of fraud and misrepresentation and same is not binding upon them. Defendants No.1 and 2 have further averred that since no prima-facie case exists in favour of the plaintiff, he is not entitled to discretionary relief of injunction as have been prayed for in the application. Defendants No. 3 to 7 while claiming themselves to be bona-fide purchaser have claimed that suit land in question was developed by them after spending huge money and they are in continuous possession since July, 2013.

4. On the basis of aforesaid pleadings adduced on record by the respective parties, learned Court below declined to grant ad-interim relief in favour of the plaintiff and dismissed the application under Order 39 Rule 1 and 2 PCP by way of order dated 9.4.2015. In the aforesaid background, plaintiff filed CMA before the learned District Judge, Hamirpur, District Hamirpur, H.P, but same was also dismissed. Being aggrieved and dissatisfied with the rejection of appeal by learned District Judge, Hamirpur, plaintiff has approached this Court in the instant proceedings, praying therein to quash and set-aside the impugned order/judgment passed by the learned Courts below.

5. I have heard learned counsel representing the parties and perused the material available on record.

6. While considering prayer for grant of injunction, court must be satisfied that the party praying for relief has a prima facie case and balance of convenience also lies in its favour. While considering prayer for injunction, if any, court is required to consider whether the

refusal to grant injunction would cause irreparable loss to such a party. Besides above, conduct of the party seeking injunction is also of utmost importance, as has been held by Hon'ble Apex Court in case M**/S Gujarat Bottling Co.Ltd. & Ors.** v. **The Coca Cola Co. & Ors.,** AIR 1995 2372. In case a party seeking injunction fails to make out any of the aforesaid ingredients, it would not be entitled to injunction. Phrases, “prima facie case”, “balance of convenience” and “irreparable loss” has been aptly interpreted by Hon'ble Apex Court in **Mahadeo Savlaram Shelke** v. **The Puna Municpal Corpn.,** J.T. 1995(2) S.C. 504,wherein Hon’ble Apex Court relying upon its earlier judgment in **Dalpat Kumar** v. **Prahlad Singh**, (1992) 1 SCC 719 has observed that the phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of justice. The court would be circumspect before granting the injunction and look to the conduct of the party, the probable injury to either party and whether the plaintiff could be adequately compensated if injunction is refused. The existence of prima facie right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury but means only that the Injury must be a material one, namely one that cannot be adequately compensated by way of damages. The balance of convenience must be in favour of granting injunction. The court while granting or refusing injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued.

7. This Court in case titled **Roshan Lal versus Ratto , AIR 1977, Himachal Pradesh 10** has also very aptly interpreted the expression “prima-facie case” and “other injury of any kind”. Having taken note of aforesaid judgments rendered by Hon’ble Apex Court as well as this Court, this Court finds that whenever the Court is called upon to examine whether the

plaintiff has prima-facie case in a suit for the purpose of determining whether a temporary injunction should be granted, it must perforce examine the merits of the case and it will be compelled to consider whether there is likelihood of the suit being decreed. Though depth of investigation which the Court must necessarily pursue for that purpose will vary with each case. The Expression "other injury of any kind" is very wide. It comprehends any kind of legal injury, and not necessarily an injury akin to a breach of contract.

8. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that suit land is owned and possessed by defendants No.1 and 2 alongwith other co-sharers and after private partition interse co-sharers land in suit comprised Khasra No.283/1 area 571/37 has come under the share of Avneet Patyal and Ajmer Patyal. Though, in the case at hand entire case of the plaintiff is based upon agreement to sell dated 26.09.2012, whereby allegedly defendants No.1 and 2 agreed to sell 154 Sq.Mts of land at the rate of Rs.70,000/- per marla, but neither original agreement nor certified copy of the agreement ever came to be placed on record by the plaintiff, rather he filed Photostat copy of the agreement. Most importantly careful perusal of plaint, copy whereof has been placed on record, nowhere reveals that the plaintiff took any specific plea that agreement to sell has been misplaced or lost by him. True, it is that photo copy of document can be placed on record, but same is required to be proved in accordance with law and it is mandatory to aver in the plaint with regard to misplacement and loss of such document and intention to prove the same by way of secondary evidence

9. Pleadings available on record reveals that agreement to sell was executed on 26.9.2012 interse plaintiff and defendants No.1 and 2, whereafter sale deed qua the suit land was executed by defendants No.1 and 2 in favour of defendant No.3, who subsequently sold the same in favour of defendants No.4 to 7, whereas present suit has been filed on 17.1.2015. As per the averments contained in the plaint, defendants No. 4 to 7 are in possession of the suit property from the date of sale deed by defendants No.1 and 2 in favour of defendant No.3, who further sold the same to defendants No.4 to 7. In the case at hand, agreement to sell allegedly executed *interse* plaintiff and defendants No.1 and 2 never came to be produced in Court, rather plaintiff with a view to prove its existence averred that he lodged complaint to police, but same cannot be plausible explanation qua the misplacement of agreement from the possession of the plaintiff.

10. Leaving everything aside, no material worth credence has been led/placed on record to demonstrate that defendants No. 4 to 7 had prior knowledge with regard to agreement to sell allegedly executed by defendants No.1 and 2 in favour of the appellant. Moreover sale

deeds were executed on 25.7.2013 and 4.4.2014 respectively, whereas suit at hand came to be filed on 17.1.2015. Since it stands specifically averred in the plaint that pursuant to sale deed executed by defendants No.1 and 2 in favour of defendant No.3, defendant No.3 came to be in possession of the suit land, who further sold the same to defendants No. 4 to 7, it is not understood that what prevented plaintiff to file suit immediately when defendants No. 4 to 7 were put to possession of the suit land. Though, factum with regard to execution of agreement to sell, if any, has been specifically denied by defendants No.1 and 2, but even otherwise perusal of Photostat copy of agreement to sell placed on record suggests that out of entire land only 154 Sq.Mts land was agreed to be sold by defendants No.1 and 2 in favour of the plaintiff and sale deed in pursuance to aforesaid agreement to sell is/was to be executed after partition of land *interse* co-sharers. Though, plaintiff claimed that defendants No.1 and 2 alongwith other co-sharers have entered into private partition and mutation of partition was sanctioned in their favour, but since he failed to place on record original agreement, it was incumbent upon him to plead specifically in the plaint that agreement to sell has been lost or same is in possession of defendants No.1 and 2 and as such, learned Court below rightly concluded that the plaintiff has failed to prove prima-facie case in his favour for grant of discretionary relief of injunction.

11. Mr. Sanjeev Kuthiala, learned Senior counsel representing the petitioner/plaintiff while admitting that there is no specific averment with regard to misplacement/lost, if any, of agreement to sell, contended that factum with regard to execution of sale deed can be safely inferred from the averments contained in the written statement, wherein defendants No.1 and 2 have stated that the plaintiff has withheld the original agreement to sell from the Court after he cancelled and revoked the same on 26.12.2012. Mr. Kuthiala, while placing reliance upon the averments contained in para-7 of the written statement, contended that once factum with regard execution of agreement to sell never came to be specifically refuted by defendants No.1 and 2 in their written statement, rather same came to be admitted in so many words, learned courts below wrongly held that the plaintiff failed to prove factum with regard to existence of agreement to sell.

12. Mr. Ramakant Sharma, learned Senior Counsel representing the respondents-defendants contended that averments contained in para-7 of the written statement cannot be read in isolation, rather same is to be read in conjunction with the averments contained in para-9, perusal whereof reveals that agreement to sell was got executed by the plaintiff alluring defendants to provide Government Job, but since he could not arrange/procure job to defendant No.2, defendant No.2 threatened him to launch criminal prosecution. Faced with aforesaid situation, plaintiff cancelled and revoked the agreement to sell dated 26.12.2012 by

making entry at the back of the agreement that all his rights in the agreement stand hereby extinguished and he is no more entitled to claim anything under the said agreement.

13. Having carefully perused the averments contained in the written statement, especially in para -7 and 9, this Court finds that some agreement to sell was executed *interse* plaintiff and defendants No.1 and 2, but same was cancelled and revoked on 26.12.2012. As per the defendants, plaintiff revoked the aforesaid agreement to sell when they threatened to launch criminal prosecution against him. As per the defendants, plaintiff revoked the forged agreement on 26.12.2012 by making entry at the back of the agreement that all his rights in the agreement stand extinguished and he is not entitled to claim anything under the said agreement, copy of aforesaid agreement was not made available by plaintiff apprehending that defendants on the basis of the same can initiate criminal proceedings against him.

14. True, it is that written statement filed by defendants No.1 and 2 if read, especially para No.7 and 9 one can presume that some agreement to sell was executed *interse* plaintiff and defendants No.1 and 2, but once defendants No.1 and 2 by way of reply specifically claimed that such agreement to sell was cancelled/revoked by the plaintiff by making entry at the back of the agreement to sell, it was all the more important for the plaintiff to produce the original copy of the same in Court while claiming the order of injunction. There appears to be considerable force in the submissions made by learned senior counsel representing the respondents-defendants that since note in the handwriting of the plaintiff stood recorded at the back side of the agreement to sell, he deliberately withheld the same from the Court and as such, he is not entitled for discretionary relief on account of mis- concealment of material facts.

15. Very conduct of the plaintiff itself suggests that he was not ready and willing to perform part of his agreement and as such, chose to remain silent for considerable time till the time defendants No.4 to 7 were put into the possession pursuant to sale deed executed by defendant No.3 in their favour. Moreover, no reasonable explanation ever came to be rendered on record by plaintiff with regard to loss of the original agreement coupled with the fact that possession was never delivered to him at the time of alleged agreement. On the top of everything, plaintiff did not bother to institute the suit at the very outset when defendants No.1 and 2 further alienated the land in order to upset the alleged agreement. As per pleadings, sale deed was executed after final partition. Though, as per the pleadings suit land stands partitioned vide mutation No.939, but no record of the same ever came to be placed on record.

16. Grant of relief for specific performance is itself a discretionary remedy and as such, party seeking temporary injunction in a suit for specific performance is required to establish a strong prima-facie case on the basis of undisputed facts. Besides above, conduct of

plaintiff will also be a very relevant consideration for the purpose of injunction. In a matter concerning grant of injunction, apart from the existence of a prima facie case, balance of convenience, irreparable injury, the conduct of the party seeking the equitable relief of injunction is also very essential to be considered.

17. Since grant of relief of specific performance is discretionary remedy, party invoking the jurisdiction of the Court is under obligation to show/demonstrate that he/she himself/herself was not at fault and he/she himself/herself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealing with the party against whom he was seeking relief. His conduct should be fair and honest. In this regard, reliance is placed upon the judgment rendered by Hon'ble Apex Court in Ambalal Sarabhai Enterprise Limited versus **KS Infraspace LLP Limited and another alongwith other connected matters (2020) 5 Supreme Court Cases 410,** wherein it has been held as under:-

> 15. Chapter VII, Section 36 of the Specific Relief Act, 1963 (hereinafter referred to as 'the Act') provides for grant of preventive relief. Section 37 provides that temporary injunction in a suit shall be regulated by the Code of Civil Procedure. The grant of relief in a suit for specific performance is itself a discretionary remedy. A plaintiff seeking temporary injunction in a suit for specific performance will therefore have to establish a strong primafacie case on basis of undisputed facts. The conduct of the plaintiff will also be a very relevant consideration for purposes of injunction. The discretion at this stage has to be exercised judiciously and not arbitrarily.
>
> 16. The cardinal principles for grant of temporary injunction were considered in Dalpat Kumar vs. Prahlad Singh, (1992) 1 SCC 719, observing as follows :
>
> > "5...Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that noninterference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

17. The negotiations between the plaintiff and the defendant is reflected in approximately 17 emails exchanged between them commencing from December 2017 to 31.03.2018. The file size of the attachment to the mails has varied from 485052485756 KBs indicating suggestions and corrections from time to time. The WhatsApp messages which are virtual verbal communications are matters of evidence with regard to their meaning and its contents to be proved during trial by evidenceinchief and cross examination. The emails and WhatsApp messages will have to be read and understood cumulatively to decipher whether there was a concluded contract or not. The use of the words 'final draft' in the email dated 30.03.2018 cannot be determinative by itself. The email dated 26.02.2018 sent by the defendant at 11:46 AM had also used the same phraseology. The plaintiff was well aware from the very inception that the defendant was negotiating for sale of the lands simultaneously with two others. The plaintiff was further aware on 30.03.2018 itself that the deal with it had virtually fallen through as informed to the escrow agent. The fact that a draft MoU christened as 'finalfor discussion' was sent the same day cannot lead to the inference in isolation, of a concluded contract. There is no evidence at this stage that the acceptance was communicated to the defendant before the latter entered into a deal with defendant no.2 on 30.03.2018 and executed a registered agreement for sale on 31.03.2018. Defendant no.2 paid Rs.17.69 crores and Rs.2.20 crores towards the income tax dues of the defendant the same day, as part of the consideration amount. It is only thereafter the plaintiff purports to have communicated its acceptance to the defendant on 31.03.2018 at 01.13 PM. The prolonged negotiations between the parties reflect that matters were still at the 'embryo stage' as observed in Agriculture Produce Market Committee, Gondal and ors. vs. Girdharbhai Ramjibhai Chhaniyara and ors., (1997) 5 SCC 468. The plaintiff at this stage has failed to establish that there was a mutuality between the parties much less that they were ad idem.

18. The pleadings in the suit acknowledge the awareness of the plaintiff of the ongoing negotiations with defendant no.2. The advance of Rs.2.16 crores was refunded to the plaintiff in the evening on 31.03.2018 by RTGS. No effort was made by the plaintiff to again remit the sum by RTGS immediately or the next day. Only a public notice was published on 03.04.2018 refuted by the defendant on 04.03.2018. The suit was then filed seven months later on 01.10.2018. The explanation that the plaintiff waited hopefully for a solution outside litigation as a prudent businessman before finally instituting the suit is too lame an excuse to merit any consideration.

19. In a matter concerning grant of injunction, apart from the existence of a prima facie case, balance of convenience, irreparable injury, the conduct of the party seeking the equitable relief of injunction is also very essential to be considered as observed in Motilal Jain (supra) holding as follows :

> "6. The first ground which the High Court took note of is the delay in filing the suit. It may be apt to bear in mind the following aspects of delay which are relevant in a case of specific performance of contract for sale of immovable property:
>
> (i) delay running beyond the period prescribed under the Limitation Act;
>
> (ii) delay in cases where though the suit is within the period of limitation, yet:

(a) due to delay the third parties have acquired rights in the subject-matter of the suit;

(b) in the facts and circumstances of the case, delay may give rise to plea of waiver or otherwise it will be inequitable to grant a discretionary relief."

20. The defendant no.2, in addition to the dues of the Income Tax department as aforesaid, made further payments to the defendant of Rs.25,44,57,769/ by 16.01.2019 aggregating to a total payment of Rs.45,84,71,869/. The defendants had also proceeded to utilize a sum of Rs.36.20 crores also and had therefore materially altered their position evidently by the inaction of the plaintiff to institute the suit in time and having allowed third party rights to accrue by making substantial investments. In Madamsetty (supra) it was observed :

"12.....It is not possible or desirable to lay down the circumstances under which a court can exercise its discretion against the plaintiff. But they must be such that the representation by conduct or neglect of the plaintiff is directly responsible in inducing the defendant to change his position to his prejudice or such as to bring about a situation when it would be inequitable to give him such a relief." Similar view has been expressed in Mandali Ranganna (supra).

21. We are therefore of the considered opinion that in the facts and circumstances of the present case, and the nature of the materials placed before us at this stage, whether there existed a concluded contract between the parties or not, is itself a matter for trial to be decided on basis of the evidence that may be led. If the plaintiff contended a concluded contract and/or an oral contract by inference, leaving an executed document as a mere formality, the onus lay on the plaintiff to demonstrate that the parties were ad idem having discharged their obligations as observed in Brij Mohan (supra). The plaintiff failed to do show the same on admitted facts. The draft MoU dated 30.03.2018 in Clause C contemplated payment of the income tax dues of Rs.18.64 crores as part of the consideration amount only whereafter the agreement was to be signed relating back to the date 29.03.2008. Had this amount been already paid or remitted by the plaintiff, entirely different considerations would have arisen with regard to the requirement for execution of a written agreement remaining a mere formality. Needless to state the balance of convenience is in favour of the defendants on account of the intervening developments, without furthermore, interalia by reason of the plaintiff having waited for seven months to institute the suit. The question of irreparable harm to a party complaining of a breach of contract does not arise if other remedies are available to the party complaining of the breach. The High Court has itself observed that from the negotiations between the parties that "some rough weather was being reflected between the plaintiff and the defendant .....". The Special Civil Judge failed to address the issue of delay. The High Court noticed the arguments of the defendants with regard to delay in the institution of the suit but failed to deal with it.

22. In M.P. Mathur vs. DTC, (2006) 13 SCC 706, this Court observed :

"14. The present suit is based on equity...In the present case, the plaintiffs have sought a remedy which is discretionary. They have instituted the suit under Section 34 of the 1963 Act. The discretion which the court has to exercise is a judicial discretion. That discretion has to be exercised on well-settled principles. Therefore, the court has to consider—the nature of obligation in respect of which performance is sought, circumstances under

> which the decision came to be made, the conduct of the parties and the effect of the court granting the decree. In such cases, the court has to look at the contract. The court has to ascertain whether there exists an element of mutuality in the contract. If there is absence of mutuality the court will not exercise discretion in favour of the plaintiffs. Even if, want of mutuality is regarded as discretionary and not as an absolute bar to specific performance, the court has to consider the entire conduct of the parties in relation to the subjectmatter and in case of any disqualifying circumstances the court will not grant the relief prayed for (Snell's Equity, 31st Edn., p.366)...."

23. Wander Ltd. (supra) prescribes a rule of prudence only. Much will depend on the facts of a case. It fell for consideration again in Gujarat Bottling Co. Ltd. vs. Coca Cola Co., (1995) 5 SCC 545, observing as follows :

> "47....Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest."

18. Needless to say, grant/refusal of relief of temporary injunction is purely an equitable relief and while refusing/granting same, court has to weigh several factors before coming to a definite conclusion. There are three basic ingredients, which are to be taken into consideration by a court while considering prayer, if any, for interim relief i.e. prima facie case, balance of convenience and irreparable loss and injury. All these factors are required to be comparatively examined by the court, but over and above, all these factors, conduct of a party seeking discretionary relief is of utmost importance. In the case at hand, material adduced on record by respective parties compels this Court to conclude that the plaintiff failed to approach the court with clean hands, as such, inference can be drawn that he, with a view to have interim order in his favour, suppressed material facts purposely and intentionally. In the case at hand, no irreparable loss and injury, which cannot be compensated in monetary terms, would be caused to the plaintiff in case injunction is not granted to him, rather, irreparable loss and injury would be caused to the defendant, in case interim injunction, as has been prayed for, is allowed.

19. Consequently, in view of the detailed discussion made hereinabove, this Court sees no illegality or perversity in the impugned judgment and order passed by learned Courts below, which otherwise appear to be based upon proper appreciation of facts and law, which are

accordingly upheld. The petition is dismissed being devoid of merit alongwith all pending applications, if any. Record of Court below be sent forthwith. Needless to say, observations made herein above, shall not be deemed to be a reflection on the merits of the case, which shall be decided by learned court below on its own merit on the basis of evidence to be led by respective parties.

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

Virender Kumar Guleria ....Petitioner.

Versus

State of Himachal Pradesh & others ...Respondents.

CWP No.1591 of 2019
Decided on: 28.09.2020

Constitution of India, 1950:- Article 226- Petitioner-working as under secretary in H.P vidhan sabha-promoted as deputy secretary-The arrangement was to continue only during leave period of Lal Singh, deputy secretary and shall not confer any right for regularization against post of deputy secretary and for seniority-petitioner assumed the charge of post of deputy secretary and his basic pay was fixed consequent upon promotion though stop gap arrangement-petitioner superannuated from post of deputy secretary –petitioner seeking pension as per post of deputy secretary. It is settled law that pension is not a bounty, but a hard earned property which an employee earns after putting substantive period of his life in the service of the employer. In this case, when the petitioner was actually promoted to the post of Deputy Secretary, may be as a stop gap arrangement, and he continued to serve against the said post in issue independently till the time of his superannuation, then he is entitled to receive pension by fixing the same by taking his last pay drawn to be that against the post of Deputy Secretary (Paras 14, 28, 29).

For the petitioners : Mr. Shrawan Dogra, Senior Advocate,
with Mr. Manish Sharma, Advocate.

For the respondents : Mr. Sumesh Raj, Dinesh Thakur and
Mr. Sanjeev Sood, Additional Advocate Generals, for respondent-State.
Mr. Rajesh Kumar Sharma, Assistant Solicitor General of India, for respondent No.2.
Mr. Anshul Attri, Advocate, for respondent No.3.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

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

"i) That Memorandum dated 24.11.2018 (Annexure P-17) issued by respondent No.3 may be quashed and set aside;

ii) That communication dated 31.10.2018 (Annexure P-15) issued by Secretary (GAD) to the Government of Himachal Pradesh to respondent No.3 may also be quashed and set aside;
iii) That the communications dated 24.10.2016 (Annexure P-6) and 16.11.2018 (Annexure P-11) issued by respondent No.2 may be quashed and set aside;
iv) That respondent No.2 may be directed to revise th Pension Payment Order (PPO) in favour of the petitioner as Deputy Secretary on the pay as admissible to him on the date of his retirement as initially recommended by respondent No.3;
v) That communication dated 13.01.2012 (Annexure P-2) may be declared inapplicable in the case of the petitioner and respondent No.2 may be restrained from applying the same to the case of the petitioner;
vi) That the arrears of pension on account of revision of PPO by calculating pension as Deputy Secretary with effect from 01.08.2016 till date may be directed to be paid forthwith with interest at the rate of 12% per annum".

2. Brief facts necessary for the adjudication of this writ petition are that vide Notification dated 18.07.2016 (Annexure P-3), respondent No.3 promoted and appointed the petitioner, who at the relevant time was serving as an Under Secretary, as Deputy Secretary in the pay scale of Rs.15600-39100+7600 Grade Pay+Rs.2500/- Secretariat Pay. It was mentioned in this Notification that the arrangement was to continue only during the leave period of Lal Singh Kanwar, Deputy Secretary and the arrangement shall not confer any right or claim on the petitioner for regularization against the post of Deputy Secretary and for seniority therein. Thereafter, vide Annexure P-4, dated 09.07.2016, petitioner assumed the charge of Deputy Secretary of respondent No.3. Vide Annexure P-5, i.e. Office Order dated 20.08.2016, the basic pay of the petitioner was fixed in terms thereof, consequent upon the promotion of the petitioner as Under Secretary, though on stop-gap arrangement. It is not in dispute that the petitioner superannuated on 31.07.2016 from the post of Deputy Secretary itself.

3. The moot issue which is involved in this petition is as to from which post, the petitioner superannuated from the service of respondent No.3 for the purpose of determining and fixing his pension and other pensionary benefits.

4. Before proceeding further, it is relevant to refer to the instructions issued by Principal Secretary (Finance) to the Government of Himachal Pradesh, to all Administrative Secretaries of the State, dated 27.04.2011 (Annexure P-1), on the subject "Regarding promotions against short term vacancies". It stands mentioned in these instructions that the Government has decided that in the cases where a vacancy arises for short duration, provisions of Fundamental Rules-49 may be invoked instead of making promotions against short term vacancies exceeding 45 days and promotions to such short term vacancies may be considered only in such exceptional cases where two conditions are met i.e. it is not possible to give charge to any other incumbent in

addition to his/her duties and the post carries duties and responsibilities of statutory nature which cannot be allowed to kept vacant in the public interest. It is further mentioned in this communication that promotion against short term vacancies can be made only after obtaining the approval of Finance Department giving full justification for promotion on departmental file. There is also on record another communication dated 13.01.2012 (Annexure P-2) from Principal Secretary (Finance) to the Government of Himachal Pradesh, to all the Administrative Secretaries of the Government and all Heads of Departments on the subject "Fundamental Rules49-withdrawal of powers". It stands mentioned in this communication that the Government has decided that powers delegated to appropriate authorities to consider the cases of combination of appointment falling under Fundamental Rules-49 stood withdrawn and in cases where it was considered in public interest to invoke the provisions of Fundamental Rules-49, the proposal be sent to the Finance Department by the Administrative Departments with the approval of competent authority.

5. Coming back to the facts of this case, after the petitioner superannuated on 31.07.2016 from the post of Deputy Secretary, a communication was sent by Indian Audit and Accounts Department, Himachal Pradesh to respondent No.3, dated 24.10.2016, calling upon respondent No.3 to furnish to the said department, order of the concurrence of Finance Department with regard to promotion of the petitioner to the short term vacancy of Deputy Secretary to revise the pension of the petitioner in the Service Book. In response thereto, vide Annexure P-7, respondent No.3 informed respondent No.2 that the instructions of the Government of Himachal Pradesh, dated 27.04.2011 were not adopted by respondent No.3 in view of the urgent duties and responsibilities of statutory nature of Vidhan Sabha Secretariat. It was further mentioned in this communication that Regulation-7 of Himachal Pradesh Vidhan Sabha Secretariat Regulations provided that the executive and financial orders issued by the Government from time to time shall not automatically apply to the Himachal Pradesh Vidhan Sabha Secretariat and may be made applicable after the approval of the Speaker. It was further mentioned therein that after Shri Lal Singh Kanwar, Deputy Secretary, Legislation proceeded on more than 45 days, it became necessary to promote the next eligible Under Secretary to the post of Deputy Secretary, subject to fulfillment of conditions/ eligibility to perform the duties and responsibilities of statutory nature as it was not possible to give the charge to any other incumbent in addition to his duties and the post could not be kept vacant in public interest. It was further mentioned in this communication that the next Senior Most Under Secretary i.e. the petitioner, who fulfilled the eligibility in terms of the Recruitment and Promotion Rules, was promoted to the post of Deputy Secretary and petitioner joined his duties as such on 18.07.2016 and held independent charge during his tenure and discharged the duties and responsibilities of the statutory nature. It was

also mentioned in this communication that the promotion of the petitioner was notified as per the instructions operative prior to Order/Instructions dated 27.04.2011 to dispose of urgent duties and responsibilities of statutory nature and it was not a case as was provided under the provisions of Fundamental Rules-49, which dealt with performance of higher duties, but in officiating manner. The stand of respondent No.3, thus, in this Communication was that pension of the petitioner in the pay scale of 15600-39000+7600GP+2500 Secretariat Pay be revised at the earliest and necessary PPO be issued in favour of the petitioner.

6. This was followed by a representation made by the petitioner to respondent No.2, dated 16.12.2017 (Annexure P-9), on the subject "Pension of Sh.Virender Kumar Guleria, Deputy Secretary (Retd.) in the pay scale of Rs.15600-39100+7600 GP+2500 Secretariat Pay". Vide this representation, the petitioner stated that as he was promoted against the post of Deputy Secretary on account of vacancy caused and as he joined as such in the pay scale of 15600-39100+7600GP+2500 Secretariat Pay on 18.07.2016 and independently held the said post in the said pay scale till the date of his superannuation, therefore, his pension be fixed against the post of Deputy Secretary in the pay scale of 15600-39100+7600GP+2500 Secretariat Pay, so that no financial loss is caused to him.

7. As no head way was being made on the issues, therefore, respondent No.3 vide Communication (Annexure P-13), dated 31.03.2018, wrote to respondent No.1, seeking *ex post facto* permission for stop gap promotion of the petitioner against the post of Deputy Secretary so that his case could be processed for the purpose of grant of pension. It was mentioned in this letter that the order of the department of Finance, Government of Himachal Pradesh, dated 27.04.2011 was not adopted by Himachal Pradesh Vidhan Sabha under the order of its Speaker and further the promotion of the senior most Under Secretary i.e. the petitioner was notified as per instructions operative prior to issuance of instructions dated 27.04.2011 to dispose of urgent duties and responsibilities of the post of Deputy Secretary, thus, explaining the circumstances in which the petitioner was promoted to the post of Deputy Secretary. This was followed by another communication to this effect dated 17.05.2018 (Annexure P-14).

8. Vide Annexure P-15, dated 31.10.2018, respondent No.1 has informed respondent No.3 that the case of the petitioner was taken up with the Finance Department for *ex post facto* promotion with regard to his stop gap promotion against the post of Deputy Secretary as a special case. The concerned department informed that the State Government has issued instructions to all the respective departments on the issue of promotion against short term vacancies and it was responsibility of the department concerned to adhere the Guidelines to ensure strict compliance thereof.

9. Thereafter also communications exchanged hands between the petitioner and the respondents, but fact of the matter is that no *ex post facto* concurrence was given by the Finance Department of the Government of Himachal Pradesh, with regard to the stop gap promotion of the petitioner against the post of Deputy Secretary, resulting in the filing of present petition by the petitioner, praying for the reliefs already enumerated hereinabove.

10. Learned Senior Counsel appearing for the petitioner has argued that the act of the respondents of not fixing the pension of the petitioner on the basis of pay drawn by him of the last post held by him at the time of superannuation is arbitrary and discriminatory, because as Vidhan Sabha cannot be construed to be a "Department" of the Government of Himachal Pradesh, therefore, instructions issued by the Finance Department, dated 27.04.2011 (Annexure P-1) and 13.01.2012 (Annexure P-2) *per se* are not binding upon the Vidhan Sabha and even if it is to be assumed that the same were binding on the Vidhan Sabha then also, for the acts of omission of the respondents, the petitioner cannot be made to suffer as he had a right to receive pension by calculating the same on the basis of last pay drawn by him against the post hold by him at the time of his superannuation.

11. Learned Counsel appearing for respondent No.3 has argued that the said respondent has done everything which was within its domain to get an *ex post facto* sanction qua the promotion of the petitioner against the post of Deputy Secretary, but in the absence of the same coming-forth from respondent No.1, it is not in a position to be of any assistance to the petitioner. The stand of respondent No.2 is that no action is required to be taken on its end with regard to revision of pension of the petitioner as there is no approval of the Finance Department with regard to the stop gap promotion of the petitioner against the post of Deputy Secretary which approval was required to be sought by the Administrative Department from the Finance Department.

12. The stand of respondent No.1 is to the effect that in the light of communications issued by the Finance Department, i.e. Annexures P-1 and P-2, there is a channel prescribed which was not followed by the employer while conferring stop gap promotion upon the petitioner, therefore, the petitioner is not entitled for the grant of pension as having superannuated from the post of Deputy Secretary.

13. I have heard learned Counsel for the parties and have gone through the pleadings as well as documents appended therewith.

14. It is not in dispute that on account of one Shri Lal Singh Kanwar, who was serving with respondent No.3 as a Deputy Secretary, proceedings on leave, the petitioner was promoted and appointed against the post of Deputy Secretary in the pay scale of 15600-39100+7600GP+2500 Secretariat Pay, by respondent No.3, vide Notification dated 18.07.2016

(Annexure P-2) as a stop gap. It is also not in dispute that on attaining the age of superannuation, the petitioner retired from the post of Deputy Secretary. It is also not in dispute that after issuance of Notification dated 18.07.2016, the petitioner performed the duties of the post of Deputy Secretary exclusively by holding this post effectively on promotion and it is not as if while holding the post of Under Secretary, he performed the duties of the post of Deputy Secretary also.

15. Fundamental Rule-49 deals with the eventuality where a Government may appoint a Government Servant already holding a post in a substantive or officiating capacity, to officiate as a temporary measure in one or more other independent posts at one time under the Government.

16. Vide communication dated 27.04.2011, issued by the Finance Department of the Government of Himachal Pradesh, the Administrative Secretaries to the Government of Himachal Pradesh were informed that the Government had decided that in cases where vacancies arise for a short duration, provisions of Fundamental Rule-49 may be invoked rather than making promotion against short term vacancies exceeding 45 days. The communication further envisaged that promotions to such short term vacancies may be considered only in such exceptional cases where two conditions were met i.e. (a) It is not possible to give the charge to any other incumbent in addition to her or his duties and; (b) The post carries the duties and responsibilities of statutory nature and cannot be allowed to be kept vacant in public interest. Same further envisaged that promotions against short term vacancies may be made only after obtaining prior approval of Finance Department giving full justification for such promotion on departmental file.

17. It is a matter of record that when the petitioner was promoted against the post of Deputy Secretary as a stop gap arrangement, the procedure prescribed in Annexure P-1 was not followed. It is also a matter of record that the procedure was not followed by respondent No.3 because of its understanding that communication (Annexure P-1) was not binding upon respondent No.3 as the same had not been adopted by the said respondent. This is apparent from the contents of letter dated 05.11.2016 (Annexure P-7) issued by respondent No.3 to respondent No.2, wherein it was the specific stand of respondent No.3 that the executive and financial orders of the Government, which were not adopted by Vidhan Sabha Secretariat, remain in applicable in Vidhan Sabha Secretariat. It was expressly mentioned in this communication that the order of the Department of Finance, dated 27.04.2011 (Annexure P-1) was not adopted by the Himachal Pradesh Vidhan Sabha Secretariat under the order of its Speaker.

18. A perusal of the contents of this Annexure further demonstrate that it was also the stand of respondent No.3 that the petitioner was promoted against the post of Deputy Secretary when Lal Singh Kanwar proceeded on leave for more than 45 days, for the reason that the duties of the post of Deputy Secretary were of statutory nature and it was not possible to give

charge to any other incumbent in addition to his duties and further the post could not have been kept vacant in public interest.

19. Respondent No.3 has framed Himachal Pradesh Vidhan Sabha Secretariat Regulations, 2002. The same have been framed in exercise of powers provided under Rule 27 of the Himachal Pradesh Vidhan Sabha Secretariat (Recruitment and Conditions of Service), Rules 1974, which Rules are framed under Article 187 (3) of the Constitution of India.

20. Regulation 7 reads as under:-

> "Orders issued by the Government-The executive and financial orders issued by the Government from time to time shall not automatically apply to the Himachal Pradesh Vidhan Sabha Secretariat but these may be made applicable after and approval of the Speaker".

21. As, I have already mentioned hereinabove, it is the specific stand of respondent No.3 that the instructions issued by the Finance Department (Annexure P-1 and P-2) have not been made applicable in the Vidhan Sabha. There is nothing on record placed by respondents No.1 and 2 to the contrary. That being the case, when it is the stand of respondent No.3 that the circulars of the Finance Department of the Government of Himachal Pradesh *ifso facto* are not binding upon the Vidhan Sabha, unless made applicable after the approval of the Speaker, in my considered view, the act of respondent No.2 of not fixing/re-fixing the pension of petitioner on the basis of last pay drawn by him while serving against the post of Deputy Secretary at the time of his superannuation for want of concurrence of Finance Department is arbitrary and not sustainable in law.

22. Petitioner was not an employee of the Government of Himachal Pradesh, but was an employee of the Himachal Pradesh Vidhan Sabha. Chapter-III of the Constitution of India deals with the State Legislation. Article 168 *inter alia* provides that for every State, there shall be a legislature which shall consist of the Governor and two Houses in certain States and one House in the remaining States. Article 187 thereof provides for the Secretariat of State Legislature. This Article reads as under:-

> "187. Secretariat of State Legislature- (1) The House or each House of the Legislature of a State shall have a separate secretarial staff:
> Provided that nothing in this clause shall, in the case of the Legislature of a State having a Legislative Council, be construed as preventing the creation of posts common to both Houses of such Legislature.
> (2) The Legislature of a State may by law regulate the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House or Houses of the legislature of the State.
> (3) Until provision is made by the Legislature of the State under clause (2), the governor may, after consultation with the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, as th case may be, make rules

> regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the Assembly or the Council, and any rules so made shall have effect subject to the provisions of any law made under the said clause".

23. The petitioner happened to be an officer of the Secretariat of the Vidhan Sabha of Himachal Pradesh. Secretariat of the Himachal Pradesh Vidhan Sabha cannot be construed to be a department of the Government of Himachal Pradesh. In this background, when one peruses instructions (Annexure P-1) dated 27.04.2011, harmoniously with the provisions of Himachal Pradesh Vidhan Sabha Secretariat Regulations, 2002, the only inference which can be drawn is this that Annexure P-1, till the time it is not made applicable by the Vidhan Sabha after the approval of the Speaker, does not apply to the Secretariat of Vidhan Sabha.

24. That being the case, the act of the respondents of not re-fixing the pension of the petitioner on the basis of last pay drawn by him against the post of Deputy Secretary of Himachal Pradesh Vidhan Sabha on the pretext of violation of provisions of Annexures P-1 and P-2 is bad in law.

25. Assuming for the sake of arguments that Annexure P-1 did apply to respondent No.3, then also in my considered view, refusal of respondent No.1 to grant *ex post facto* sanction with regard to the stop gap promotion of the petitioner against the post of Deputy Secretary is not sustainable in law. Annexure P-1 is not a complete bar on promotions against short term vacancies. All that this communication envisages is that in routine, promotions should not be effected against short term vacancies and in case, twin conditions led therein were met, only then promotions be made against short term vacancies and that too after obtaining prior approval of the Finance Department.

26. In the present case, as I have already mentioned hereinabove also, respondent No.3 was of the view that as Annexure P-1 was not binding upon it and not applicable upon it, therefore, it was not necessary for it to obtain any prior approval of the Finance Department before effecting any promotion against a short term vacancy. This Court reiterates that the stand so taken by respondent No.3 in this regard is the right stand because it is in harmony with the provisions of 2002 Regulations. Dehors of that, when subsequently, respondent No.3 sought *ex post facto* sanction from respondent No.1 with regard to the stop gap promotion of the petitioner against the post of Deputy Secretary by justifying the promotion so made by it expressly in terms of the twin test led by the Government in its communication dated 27.04.2011, thereafter also, refusal of the Government to give *ex post facto* sanction in this regard as stands conveyed vide communication dated 31.10.2018 (Annexure P-15) is arbitrary and not sustainable in law.

27. Respondents are neither understanding nor appreciating that it is the petitioner who has been the victim of their hyper technical approach in the entire matter wherein an employee who superannuated from the service of respondent No.3 while serving against the post of Deputy Secretary has been deprived of his pension to be fixed on the basis of least pay drawn by him while serving as a Deputy Secretary.

28. It is not the case of either of the respondents including respondents No.1 and 2 that the petitioner was not eligible to be promoted against the post of Deputy Secretary or was not the senior most eligible incumbent at the time when stop gap promotion was made. That being the case, therefore also, the hyper technical approach adopted by the respondents in defeating the legitimate right of the petitioner to have his pension re-fixed on the basis of the pay scale of the spot of Deputy Secretary is bad in law. It is settled law that pension is not a bounty, but a hard earned property which an employee earns after putting substantive period of his life in the service of the employer. In this case, when the petitioner was actually promoted to the post of Deputy Secretary, may be as a stop gap arrangement, and he continued to serve against the said post in issue independently till the time of his superannuation, then he is entitled to receive pension by fixing the same by taking his last pay drawn to be that against the post of Deputy Secretary.

29. Accordingly, this writ petition is allowed by setting aside order dated 31.10.2018 (Annexure P-15) and by further holding that Annexures P-1 and P-2 are not applicable as far as respondent No.3 is concerned. All other communications to the contrary are also ordered to be quashed and set aside. Respondents are directed to revise the Pension Payment Order in favour of the petitioner as Deputy Secretary on pay as was admissible on the date of his retirement. Arrears be paid on or before 30.11.2020. If arrears are not paid by 30.11.2020, then interest at the rate of 6% shall be paid on the arrears from the date of filing of the petition till the date of actual payment. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, also stands vacated.

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

Dr.Joginder Singh ...Petitioner.

Versus

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

CWP No.2542 of 2020
Reserved on: 28.10.2020
Date of Decision: December 9, 2020

Constitution of India, 1950;- Article 226- Petitioner serving as a Principal Government Polytechnic Paonta Sahib, promoted as Joint Director (Technical Education) was not given additional increment on promotion- Petitioner claiming right to have increment on promotion on the ground of higher responsibilities attached to the post of Joint Director- Held, that condition precedent for getting benefit of increment under F.R. 22 is that promotional post should have higher pays Scale whereas pay scale of Principal (Polytechnic) and Joint Director is the same- O.M dated 7.1.2013 not adopted by State of H.P and its contents not applicable- Petition dismissed- (Paras 8,11,12)

For the Petitioner: Mr.Ajay Sharma, Senior Advocate, alongwith Mr.Ajay Thakur, Advocate, through Video Conferencing.

For the Respondents: Mr.Raju Ram Rahi, Deputy Advocate General, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Petitioner has approached this Court, seeking direction to the respondents to grant one increment to him on his promotion to the post of Joint Director (Technical Education) from the post of Principal (Polytechnic)on and w.e.f. 03.08.2017 in subsequent years.

2. Petitioner, who was serving as a Principal Government Polytechnic Paonta Sahib in Technical Education Department, was promoted as Joint Director (Technical Education) on 02.08.2017.

3. Pay Scale of posts of Principal (Polytechnic) and Joint Director (Technical Education) are identical and they fall in Pay Band-5 `37400-67000+8700 (Grade Pay).

4. As a Principal, vide order dated 07.07.2017, after granting annual increment to the petitioner on the post of Principal, his pay was fixed at `68690+8900 (Grade Pay) and his total basic pay was fixed at `77,590/-. Post of Joint Director (Technical Education) is also in Pay Band-5 `37000-67000+8700 (Grade Pay). Post of Joint Director (Technical Education) is a promotional post, feeder category whereof, is Principal (Polytechnic) serving in the Department of Technical Education.

5. On promotion as Joint Director (Technical Education), additional increment on promotion, was not given to the petitioner, whereupon he had represented to the Department for grant of increment on such promotion. For receiving no response from the Department, present petition was preferred.

6. Petitioner is claiming his right to have increment on promotion to the post of higher responsibility, on the ground that Joint Director is appointed/promoted on the basis of recommendation of DPC after considering candidature of incumbents serving as Principals (Polytechnic) and Joint Director has control over incumbents serving as Principals (Polytechnic)

throughout the State and, therefore, post of Joint Director (Technical Education) is a post carrying duties and responsibilities of greater importance than those attached to the posts of Principal. Therefore, it is claimed by the petitioner that he is entitled for benefit of increment on his promotion by applying provisions of F.R. 22(I)(a)(1).

7. To substantiate his claim, petitioner has also placed reliance upon grant of such increment to incumbents promoted as Joint Directors prior to him and he has placed on record orders dated 17.11.2004 and 03.01.2008 as Annexure P-8 Corollary, which indicate that vide these orders incumbents promoted from the post of Principals to the post of Joint Director were granted benefit under F.R. 22 (I)(a)(1) on their promotion.

8. During pendency of petition, in sequel to orders dated 28.08.2020 and 11.09.2020 passed by this Court, respondents have decided representation of the petitioner on the basis of report of Services Committee which was constituted vide order dated 14.09.2020. Relevant observations of the Committee are as under:-

> "The committee comprehensively examined the matter strictly in the light of the instructions issued by the Govt. vide letter dated 10/09/2020 (Copy enclosed as Ann-1) duly taking into account the directions given by the Hon'ble High Court on dated 28/8/2020 (Copy enclosed as Ann-II) and observed the following:-
>
> i) Dr. Joginder Singh, was appointed as HOD (Commerce & Secretarial Practice now Modern Office Practice) on 28/4/1992, in the pay scale of Rs. 3700-5300. He was promoted to the post of Principal (Polytechnic) in the Pay Band-5 Rs. 37400-67000+8700 Grade Pay and further promoted to the post of Joint Director (Technical Education) vide Govt. Notification No. EDN(TE)2(12)2017 dated 2/8/2017 in the same Pay Band-5 of Principal (Polytechnic) to Rs.37400-67000+8700 Grade Pay. The Pay Scale of the both posts is identical.
>
> ii) As per Rule FR-22(III) for the purpose of this rule, the appointment shall not be deemed to involve the assumption of duties and responsibilities of greater importance, if the post to which it is made is on the same scale of pay as the post, other than a tenure post, which the Government servant holds on a regular basis at the time of his promotion or appointment or on a scale of pay identical therewith.
>
> iii) As per Rule 11 of HPCS(Revised) Rule, 2009 clarification issued vide letter No. Fin(PR)B(7)-1/2009 dated 19/9/2009 provided that the pay on promotion after 1/1/2006 in the revised pay structure from one grade to another shall be fixed under Rule FR22(I)a(i) whereas the applicant Dr. Joginder Singh was promoted in the same Pay Band-5, therefore the aforesaid rule could not be applicable in the case of the applicant.
>
> Keeping in view the facts and perusal of record as stated above, the matter regarding grant of the increment on the promotion as Joint

Director to the Petitioner has been examined at this Directorate level in the light of the aforesaid Govt. instructions conveyed by the Principal Secretary (TE) to the Govt. H.P. vide letter referred to above and found that the pay scale of the post of Principal (Polytechnic) and Joint Director is same i.e. Rs. 37400-67000+8700 G.P., therefore, the benefits of increment on promotion to the post of Joint Director can not be allowed to the applicant Dr. Joginder Singh, Joint Director being promotion on identical pay scale.

2. … … …

a) … … …

b) … … …

However in view of the detailed facts and submission as made in Para (ii) and (iii) above, the financial benefits by way of granting one increment on promotion to the post of Joint Director under Rule FR-22(1)a(i) were erroneously given as Rule FR-22(1)a(i) is applicable only for promotion from one grade to another whereas the incumbents i.e. Sh. D.R. Sharma and Sh. A.K. Ahuja were promoted in the same Pay scale of Rs. 14300-18600/-."

9. At this stage it would be relevant to refer provision of F.R.22(I)(a)(1), which reads as under:-

"F.R.22.(I) The initial pay of a Government servant who is appointed to a post on a time-scale of pay is regulated as follows:-

(a)(1) Where as Government servant holding a post, other than a tenure post, in a substantive or temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity, as the case may be, subject to the fulfillment of the eligibility conditions as prescribed in the relevant Recruitment Rules, to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued or [rupees one hundred only], whichever is more.

[Save in cases of appointment on deputation to an *ex cadre* post, or to a post on *ad hoc* basis or on direct recruitment basis], the Government servant shall have the option, to be exercised within one month from the date of promotion or appointment, as the case may be, to have the pay fixed under this rule from the date of such promotion or appointment or to have the pay fixed initially at the stage of the time-scale of the new post above the pay in the lower grade or post from which he is promoted on regular basis, which may be refixed in accordance with this rule on the date of accrual of next increment in the scale of the pay of the lower grade or post. In cases where an *ad hoc* promotion is followed by regular appointment without break, the

> option is admissible as from the date of initial appointment / promotion, to be exercised within one month from the date of such regular appointment.
>
> *Provided that where a Government servant is, immediately before his promotion or appointment on regular basis to a higher post, drawing pay at the maximum of the time-scale of the lower post, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post held by him on regular basis by an amount equal to the last increment in the time-scale of the lower post or rupees one hundred, whichever is more."

10. Learned counsel for the petitioner has also placed reliance upon G.I., M.F., O.M. No. 10/02/2011-E. III/A, dated the 7th January, 2013, wherein it is notified as under:-

> "2. In terms of this Ministry's O.M. No. 169/2/2000-IC, dated 24-11-2000, dealing with the situation whereby both the feeder and the promotional grades were placed in the identical revised pay scales based on the recommendations of the Fifth Central Pay Commission, it was provided, *inter alia,* that only in cases where it was not found feasible to appropriately restructure cadres in question on functional, operational and administrative considerations, extension of the benefit of fixation of pay under FR 22(I) (a) (1) could be considered on the merits of each case, provided all the conditions precedent for the grant of this benefit were fully satisfied and promotion to the post in question actually involved assumption of higher responsibilities."

11. Applicability of aforesaid O.M. dated 07.01.2013 in the State of Himachal Pradesh has not been established. It is settled position that Office Memorandum issued by Government of India is not *ipso facto* applicable to the State of Himachal Pradesh unless it is adopted by the State of Himachal Pradesh or it is made applicable to the State of Himachal Pradesh by virtue of any provision of law or order of competent authority issuing it. Therefore, applicability of aforesaid O.M. in State of Himachal Pradesh, is doubtful,more particularly for framing of its own Rules by State of Himachal Pradesh namely Himachal Pradesh Civil Services (Revised Pay) Rules, 2009, to regulate and implement revision of payscales in the State of Himachal Pradesh.

12. Otherwise also, contents of the aforesaid O.M. dated 07.01.2013, referred by learned counsel for the petitioner, are applicable to those cases where both the feeder and promotional grades were placed in the identical revised pay scales based on the recommendations of Fifth Central Pay Commission. There is nothing on record to establish that posts of Principal and Joint Director, in present case, have been placed in identical revised pay scale on the basis of recommendation of Fifth Central Pay Commission and prior to that these

posts were having different pay scale. Further, there is a rider in this O.M. for consideration of a case for grant of benefit of fixation of pay under F.R.22(I)(a)(1) that it would be considered on merit of each case provided all the conditions precedent for grant of these benefits are fully satisfied. F.R. 22(III) is very clear that when appointment is to the post having identical pay scale then, it shall not be deemed to involve assumption of duties and responsibilities of greater importance for the purpose of this Rule i.e. F.R. 22. Therefore, condition precedent for getting benefit under this Rule is that promotional post should be having different/higher scale of pay and, thus, in case of promotion to the post, in identical pay scale, benefit of F.R. 22 is not expendable in view of specific provision of F.R. 22(III) and the effect and enforcement of F.R. 22(III) cannot be wiped out by an Office Memorandum. Therefore, observations of the Service Committee quoted supra have force and appears to be correct.

13. With respect to grant of benefit of F.R. 22 in case of incumbents promoted earlier as Joint Director from the post of Principal, it is submitted on behalf of the respondents that such grant of benefit was erroneous and contrary to law and plea of respondents, for discussions herein above, appears to be correct.

14. It is a settled law that a wrong precedent cannot be made basis for grant of benefit in other cases and thus petitioner cannot be benefited for erroneous grant of earlier incumbents. Hence, I find no merit in claim of petitioner.

15. Before disposing of present petition, it would be necessary to point out thatit is also expected from the respondent-authority to take appropriate action, in accordance with law to rectify its mistake committed in case of incumbents promoted earlier, at least for future, in accordance with law. Therefore, respondents are directed to take appropriate action with respect to fixation of pay and consequential benefits thereof, with respect to D.R. Sharma and A.K. Ahuja on their promotion from post of Principal to the post of Joint Director, in accordance with law to ensure fixation of their pension on the basis of their correct pay fixation by following proper procedure, provided under law. It is made clear that no recovery shall be made from the pension/amount already paid to those incumbents. However, payment of correct pension shall be ensured for future. Necessary action will be completed by the respondents on or before 31.01.2021.

16. Petition is dismissed in aforesaid terms. Pending application(s), if any, also stand disposed of.

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

Vikas Sharma ...Petitioner

Versus

Vishant Bali .... Respondent

Cr.MMO No. 359 of 2019
Date of Decision 8th December, 2020

Negotiable Instruments Act, 1881;- Section 145 (2)- Notice of accusation put to the accused- Application under section 145 of NI Act, dismissed vide order dated 8.4.2019- Challenged- Held, that proper stage to entertain application under section 145 NI Act is after recording substance of accusation and after closure of or during leading of evidence of complainant – that the word "shall" in Section 145 (2) has casted a mandatory duty upon the court to call the witness(es) for examination /cross-examination on an application – Further, after putting notice of accusation to the accused, the Magistrate is required to decide the nature of trial i.e summary trial under Section 143 or regular trial under second proviso to Section 143- Trial Court committed illegality in dismissing application under section 145 NI Act- Petition allowed (Paras 9,10,25,30)

Cases referred:
Mandvi Cooperative Bank Ltd. vs. Nimesh B. Thakore reported in (2010)3 SCC 83;
Meters and Instruments Private Ltd. and another vs. Kanchan Mehta reported in (2018)1 SCC 560;
Omparkash Shivprakash vs. K.I. Kuriakose and others reported in (1999)8 SCC 633;

For the Petitioner: Mr. Mukul Sood, Advocate.

For the Respondent: Mr. Sanjeev K. Suri, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Present petition has been filed assailing the impugned order dated 8.4.2019 passed by Additional Chief Judicial Magistrate-I, Amb, District Una, whereby an application, filed on behalf of accused/petitioner under Section 145(2) of Negotiable Instrument Act ('NI Act' in short), has been dismissed.

2 I have heard learned counsel for the parties and have also gone through the record.

3. It is evident from the record that the petitioner/accused was summoned by the trial Court on the basis of statements/affidavit filed by and on behalf of complainant/respondent and after receiving the notice from the trial Court, petitioner/accused had appeared in the Court on 6.12.2017.

4. On 27.8.2018, before putting Notice of Accusation, time, as prayed for, was granted to the petitioner/accused by the trial Court for filing an application under Section 145 of NI Act and the application, so filed, was dismissed vide impugned order passed on 8.4.2019,

rejecting the request of petitioner/accused to summon and examine the witnesses, whose affidavits have been filed by the respondent/complainant in support of his case.

5 Point, raised by petitioner in the present petition, is that in an application, filed by the accused or prosecution under Section 145(2) of NI Act for summoning and examining any person giving the evidence on affidavit, the Court has no discretion to refuse to summon and examine such person as to the facts contained in the affidavit filed by the said person. To substantiate his plea, judgment pronounced by the Apex Court in ***Mandvi Cooperative Bank Ltd. vs. Nimesh B. Thakore*** reported in ***(2010)3 SCC 83,*** has been referred.

6 On perusal of record of the trial Court, it is noticed that the trial Judge has also ventured in discussing the merits of case on the basis of plea taken by accused in the application, despite the fact that there was no occasion to discuss the same at this stage that too in an application filed under Section 145(2) of NI Act.

7. Besides above, it is also noticed that on 27.08.2018 on request of accused, without resorting to record substance of accusation or putting Notice of Accusation or framing the charge, and recording response of accused thereto, the Magistrate had granted time to the accused to file an application under Section 145 of Negotiable Instrument Act that too without giving an opportunity to the complainant to file/lead any further evidence, if any, which he would have intended to bring on record after commencement of trial. For discussion hereinafter, I am of considered view that on this count trial Court has committed a mistake of law.

8. Section 145 of Negotiable Instrument Act reads as under:-

> ***"Section 145 of Negotiable Instruments Act 1881: "Evidence on affidavit"***
> ***(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.***
> ***(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein."***

9 On the issue, raised in this case, the Apex Court in ***Mandvi Cooperative Bank's case,*** has held that two words i.e. 'may' and 'shall' in Section 145(2) NI Act have been used by the Legislature with reference to the 'Court' and with reference to the 'prosecution or accused' respectively and therefore, it is beyond doubt that in the event of an application made by the prosecution or accused, the Court would be obliged to summon the person giving evidence on affidavit in terms of Section 145(1) of NI Act without having any discretion in the matter and therefore, if an application is made under Section 145(2) of NI Act either by prosecution or by the accused, the Court must call the person, who has given evidence on

affidavit, for examining him again as to the facts contained therein. Intention of Legislature, in this regard, is very clear as the Legislature has used two distinct and different words i.e. 'may' and 'shall' for two different situations and it is not made mandatory for the Court to summon and examine the persons filing the affidavit in all eventuality, but a discretion has been given to the Court to call such witnesses, if Court feels it necessary, but in the case of application filed by 'prosecution' or 'accused', by using word 'shall', it has been made mandatory to summon and examine such person.

10 Learned Magistrate has failed to consider that fair trial to the accused, particularly in those proceedings where the accused has to suffer severe consequences, always remained paramount consideration of the Legislature and judiciary. For that reason only, Legislature by using word 'shall' in Section 145(2) of NI Act has casted a mandatory duty upon the Court to call the witness(es) for examination/cross-examination on the application of prosecution or accused.

11 In view of bare provision of Section 145(2) of NI Act and law laid down by the Apex Court, the trial Court has committed an illegality in dismissing the application filed by the petitioner/accused.

12. In present case, there is another issue which requires consideration. Application under Section 145 of NI Act was entertained at wrong stage whereas such application is permissible after closure of or during leading of evidence of complainant, at a stage when complainant would have been given opportunity to lead and complete his evidence after recording substance of accusation or putting notice of accusation or framing of charge but not before that. Therefore, the application should not have been permitted to be filed at wrong stage and in any case, if it had been permitted to be filed at wrong stage, then the same should have been kept pending for consideration at appropriate stage. It would be clear from discussions recorded hereinafter. This Court has already decided a similar case but keeping in view repetition of similar mistake by the Magistrate, it has become imperative to repeat discussions contained in previous case Cr.MMO No. 82 of 2019 titled Pardeep Verma vs. Budh Dev Kalia.

13. The Supreme Court in ***Mandvi Cooperative Bank Ltd. Case*** (referred supra) has also observed that it is not difficult to see that Sections 143 to 147 lay down a kind of a special code for the trial of offences under Chapter XVII of NI Act and these Sections were inserted in the Act by Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 to do away with all stages and processes in a regular criminal trial which normally cause inordinate delay in its conclusion and also to make the trial procedure as expeditious as possible without, in any way, compromising on the right of accused for a fair trial. Therefore,

right of the accused for having a fair trial can never be ignored by any Court particularly where it leads to curtailment of personal liberty.

14 Considering its own judgments passed in ***Mandvi Cooperative Bank Ltd. And J.V. Baharuni's cases*** along with various other judgments, object of introducing Chapter XVII in the NI Act and the scheme to be followed by the Magistrate in a case thereunder has also been discussed and explained by the Apex Court in judgment rendered in ***Meters and Instruments Private Ltd. and another vs. Kanchan Mehta*** reported in ***(2018)1 SCC 560,*** which is the basis for findings rendered hereinafter.

15. The Apex Court, in ***Omparkash Shivprakash vs. K.I. Kuriakose and others*** reported in ***(1999)8 SCC 633,*** while dealing with similar provision of Section 16-A of the Prevention of Food Adulteration Act 1954, empowering the Judicial Magistrate of first Class to try the offence under Section 16(1) of the said Act in summary way, has observed that Chapter XXI of Cr.P.C deals with summary trial wherein Section 262 Cr.P.C. provides that procedure, specified for trial of summons cases, shall be followed for summary trial, but subject to some variations as necessary keeping in view provisions of special Code dealing with the case, and Chapter XX of Cr.P.C. is titled as "Trials of summons cases by Magistrates" wherein Section 251 of Cr.P.C. is a commencing provision which requires that on appearance of accused or bringing him before the Magistrate, the particulars of offence shall be stated to him and he shall be asked whether he pleads guilty or not and therefore, it has been held that if the Magistrate opts to hold summary trial, 'trial' of offence under the said Act begins when the Magistrate asks the accused whether he pleads guilty or not as envisaged in Section 251 of the Code. It is further held that evidence in a 'trial' can be adduced only after recording the plea of accused as envisaged in the said Section.

16 Similarly, Section 143 of NI Act empowers the Court to try the cases summarily by applying Sections 262 to 265 (both inclusive) of Cr.P.C. 'as far as may be' applicable. In view of provisions of Section 262 Cr.P.C., procedure for trial of summons case, as provided in Sections 251 to 259 Cr.P.C. contained in Chapter XX of Cr.P.C., is to be followed in summary trial with variations keeping in view provisions of Sections 263 to 265 Cr.P.C. and in trial under NI Act, it shall be subject to further variations in consonance with provisions of NI Act. Section 251 Cr.P.C. provides that immediately on appearance of accused before the Magistrate, the particulars of the offence, of which he is accused, shall be stated to him and he shall be asked whether he pleads guilty or has any defence to make, but it would not be necessary to frame a formal charge. Therefore, trial in case of summary trial under NI Act shall also commence after asking the accused as to whether he pleads guilty or has any defence to make as envisaged in Section 251 Cr.P.C. In case of regular trial, other than summary trial and summons case

trial, trial shall begin on framing of charge under provisions contained in Chapter XVII of the Cr.P.C.

17 Procedure of Section 262 of Cr.P.C. provides that in summary trial, procedure specified in Cr.P.C. for trial of summons case shall be followed except as provided in Sections 263 to 265 Cr.P.C. Section 263 Cr.P.C. provides the manner in which record in summary trial is to be maintained and in it Section 263 (f) of Cr.P.C. provides that after entering the necessary information as envisaged to Section 263(a) to 263 (e), the Magistrate has to record the offence complained of and the offence (if any), proved and thereafter to record the plea of accused and his examination, (if any), and then to record the findings and sentence or other final order with date on which the case terminated, whereas Section 264 Cr.P.C. provides that in every case, tried summarily, in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding. Therefore, as also held by the Apex Court in ***J.V. Baharuni's and Meters and Instruments Private Ltd.'s cases,*** the Magistrate is not expected to record evidence in a summary trial which he would have been, otherwise, required to record in a regular trial but to record substance of evidence and his judgment should also contain a brief statement of reasons for findings and not elaborated reasons which otherwise he would have been required to record in regular trials. Section 143 of NI Act further qualifies that provision of Sections 262 to 265 of Cr.P.C. shall apply to summary trials under NI Act 'as far as may be'. Therefore, provisions of Sections 262 to 265 Cr.P.C. are to be applied with variation so as to follow the procedure adhering to provisions of NI Act.

18. Sub-section (2) of Section 262 Cr.P.C. provides that no sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under Chapter XXI of Cr.P.C. But provisions of first proviso to Section 143 of NI Act empowers the Magistrate to pass a sentence of imprisonment upto one year and an amount of fine exceeding Rs.5000/- on conviction in a summary trial. Therefore, limit to impose the sentence as provided under Section 262 (2) of Cr.P.C. is not applicable in the summary trial under NI Act but it shall be governed by second proviso of Section 143 of NI Act.

19. Second proviso to Section 143 of NI Act also empowers the Magistrate, if it appears to him, keeping the nature of case, that a sentence of imprisonment for a term exceeding the term provided under first proviso may have to be passed or that, for any other reason, it is undesirable to try the case summarily, to recall the witness who may have been examined and to proceed to hear or re-hear the case in the manner provided by the Cr.P.C. but after hearing the parties and recording the order to that effect. It gives discretion to the

Magistrate either to proceed summarily or otherwise for a regular trial, as warranted in the facts and circumstances of the case.

20. Referring ***Mandvi Cooperative Bank Ltd.'s case*** the Apex Court in, ***J.V. Baharuni's and Meters and Instruments Private Ltd.'s cases (supra)*** has further observed that procedure of summary trials, to be adopted under Section 143 of NI Act, is subject to the qualification 'as far as possible' and it leaves sufficient flexibility of a procedure to be adopted by the Magistrate so as not to affect the quick flow of trial process and therefore Section 143 of NI Act coupled with the provisions of Section 145 of NI Act allows for the evidence of complainant to be given on affidavit in any inquiry, trial or other proceedings under the Cr.P.C. Section 2(g) of Cr.P.C. defines that inquiry means every inquiry other than a trial, conducted under Cr.P.C. by the Magistrate or the Court. Trial has not been defined anywhere in Cr.P.C. As held by the Apex Court in ***Omparkash's case*** for the purpose of present case, if Magistrate decides to try the case as summary trial or summons case trial then it has to commence on production or presence of accused under Section 251 Cr.P.C. on recording substance of accusation or putting Notice of Accusation to the accused as the case may be and proceedings before that are inquiry by the Magistrate.

21. Section 145 of NI Act provides filing of evidence of complainant on affidavit with further provision that the said evidence may, subject to all just exceptions, be led in evidence in any inquiry, trial or other proceedings under the Cr.P.C. Therefore, in a case under Section 138 of NI Act, the Magistrate is empowered to accept the evidence of complainant on affidavit even before the commencing of trial during its preliminary inquiry at the time of taking the cognizance of the offence under NI Act. The rider that the said affidavit shall be subject to all just exceptions means that the evidence, so filed on affidavit, shall be evidence 'admissible' under the Indian Evidence Act and further provision for reading the said affidavit in evidence in any inquiry, trial or other proceedings empowers the Magistrate not to ask for fresh affidavit on or after commencing of trial but to read the same affidavit in evidence again after the commencement of trial if the accused does not plead guilty.

22. Section 145(2) of NI Act provides for summoning and examining any person giving evidence on affidavit as to facts contained therein, if the Courts think fit to do so or on application of prosecution or the accused. In NI Act there is a slight departure to the procedure provided for a summary trial in Cr.P.C. where Magistrate has to record substance of evidence only and in a case under the NI Act, parties may file their evidence on affidavits and complainant or any other person giving evidence on affidavit 'may' be called by the Court suo moto, or 'shall' be summoned and examined on application of prosecution or the accused.

23. Section 143-A of NI Act, empowers the Court trying an offence under Section 138 of NI Act to order the drawer of cheque to pay interim compensation to the complainant, where drawer pleads not guilty to the accusation made in the complaint in summary trial or summons case trial or upon framing of charge in any other case. Therefore, in a 'regular trial' under NI Act, Magistrate has option either to proceed with summary trial or summons case trial or any other trial other than summary trial or summons trial.

24 As held by the Apex Court in ***J.V. Baharuni's case*** there is no straitjacket formula to try the cases falling under NI Act and the law provided therefor is so flexible that it is upto the prudent judicial mind to try the case summarily or otherwise based on the facts and circumstances of the case and the Courts while dealing with matters under NI Act should keep in mind that difference between the summary and summons trials for the purpose of NI Act is very subtle but has grave repercussion in the case of mistaken identification of trial and therefore, it is desirable from the Magistrate to mention specifically that as to whether trial is being conducted as a summons case or summary case.

25 As discussed hereinabove, combined reading of provisions of Chapter XVII of NI Act and Sections 262 to 265 of Cr.P.C. contained in Chapter XXI of Cr.P.C. coupled with the provisions of Chapter XX of Cr.P.C. indicates that for trying a case under NI Act the Magistrate, on presence of accused before him, after taking cognizance of an offence on complaint under Section 138 of NI Act, on the basis of evidence in the shape of affidavit and documents, has to decide the nature of trial i.e. summary trial under Section 143 of NI Act or regular trial as provided under second proviso to Section 143 of NI Act to be conducted in case and has to ask the accused whether he pleads guilty or has a defence to make by recording substance of accusation or putting notice of accusation or framing of charge as the case may be and response of accused thereto and thereafter, Magistrate will follow either of the following courses depending upon particular eventuality.

A. Summary trial

A.(I) In case, accused, on putting substance of accusation, pleads guilty, the Magistrate after recording his plea shall convict him thereon in consonance with other relevant provisions of law including Sections 262 to 265 of Cr.P.C. dealing with summary trial.

A.(II) In case of continuing the trial as a summary trial for not pleading guilty by accused, as provided under Section 262 Cr.P.C. read with provisions of Section 143 of NI Act, the Magistrate has to follow the scheme of trial of summons case as provided under Chapter XX of Cr.P.C. But the Magistrate has not to follow the letters of provisions of Chapter XX but the scheme thereof, because Section 262 Cr.PC. providing procedure for summary trial states that for a summary trial, the procedure specified in Cr.P.C. for trial of summons case shall be

followed with exceptions contained in Chapter XXI dealing with summary trials and further Section 143 of NI Act also provides that provisions of Sections 262 to 265 shall also apply to summary trial under NI Act 'as far as may be'. Therefore, intent of Legislature is that Scheme of Chapter XX of Cr.P.C. dealing with trial of summons case shall be applicable to summary trials 'in principle' only which means that after presence of accused before the Magistrate, in response to the process issued against him after taking cognizance of offence by the Magistrate, he has to be informed about accusation against him but it would not be necessary to frame a formal charge or put a Notice of Accusation to him as required in a summons case but the Magistrate has to record in his order, the fact of putting the substance of accusation to him and substance of response of accused thereto and thereafter, before considering the evidence already filed by way of affidavit by complainant, to call the complainant for filing any further evidence, if any, and to call for evidence by accused in rebuttal thereto including summoning and examining any person giving evidence on affidavit as provided under Section 145 of NI Act. Adopting aforesaid procedure there would be substantial compliance of Section 254 of Cr.P.C. After completing this process, the Magistrate shall return his findings either acquitting or convicting the accused as provided under Sections 263 and 264 Cr.P.C.

B. Regular trial (trial other than summary trial)

In case the Magistrate resorts to the provisions of second proviso of Section 143 of NI Act and decides to proceed further for a trial other than summary trial then he has to follow the provisions provided for such trial under Cr.P.C. in letter and spirit and to conclude the regular trial by complying such provisions religiously.

B.(I) In case of summons case, trial, on appearance or bringing of accused before the Magistrate, before proceeding further, it would be necessary to put Notice of Accusation to accused as provided under Section 251 Cr.P.C. Thereafter, Magistrate shall proceed as per provision of Chapter XX of Cr.P.C, but definitely with variance, for adhering to the provisions of Chapter XVII of the NI Act.

B.(II) In case of regular trial, other than summary and summons case trial, the Magistrate has to frame charge against the accused, as provided in Chapter XVII of Cr.P.C. particularly under Section 211 Cr.P.C. Thereafter Magistrate has to follow procedure provided for such trial in Cr.P.C., of course with variations in consonance with provisions of NI Act.

26. In case where Magistrate, at first instance, decides to conduct summary trial, he is also empowered to switch over from summary trial to regular trial at any stage i.e. at the commencement or in the course as provided under second proviso to Section 143 of NI Act.

27 Magistrate, under Section 138 of NI Act, is empowered to impose sentence of imprisonment for a term extendable upto two years and to impose fine twice the amount of the cheque or with both.

28 In the present case, it appears that Magistrate was intending to follow procedure for regular trial as a summons case and perhaps, therefore only, the trial Magistrate had ordered to list the matter for 'Notice of Accusation' to accused. Though the Magistrate has not recorded any such reason for adopting the procedure of a 'summons case trial' instead of trying the case summarily which ought to have been done by the said Magistrate prior to ordering for listing the case for Notice of Accusation, however, the Apex Court, in the cases referred supra, has observed that the procedure adopted by the Magistrate will indicate that as to whether case was tried summarily or in a regular way, therefore, in present case, it can be inferred that Magistrate has intended to opt for regular trial as the case was fixed for Notice of Accusation.

29 Further, the Magistrate has taken the cognizance of the case on the basis of preliminary evidence and other evidence filed by complainant with complaint and had summoned the accused and on presence, accused was directed to furnish the personal and surety bonds which were furnished by accused and attested and accepted by Magistrate and thereafter time was granted, as prayed for, by accused, for filing an application under Section 145 of NI Act for summoning the complainant for examination before putting Notice of Accusation.

30 It is evident from record that on the very first day of appearance of accused neither charge was framed nor Notice of Accusation was put to him and it was also not recorded that substance of accusation was communicated to him for his response as to whether he pleads guilty or has any defence to make. After putting the substance of accusation/Notice of Accusation to the accused, in case of not pleading guilty by him, the Magistrate would have either recorded substance of accusation to follow the procedure in summary trial or would have followed procedure for regular trial after putting notice of accusation or framing the charge as the case may be and thereafter would have asked the complainant to lead any further evidence, if any, in support of his case and thereafter occasion to entertain application under Section 145(2) of NI Act would have arisen to pray for summoning and examining the persons who might have given evidence on affidavit i.e. only after filing/leading any other further evidence or opting for not to lead further evidence by the complainant not prior to that.

31. At the first instance, trial will commence thereafter application is to be undertaken. In given facts and circumstances, procedure adopted by the trial Court is amounting to putting the bullock behind the cart.

32 The trial Court has committed patent illegality in in impugned order. Serious mistake committed by the trial Court is not mere irregularity but illegality. Therefore, impugned order dated 8.4.2019 rejecting the application filed under Section 145 of NI Act is set aside with direction to the trial Court to consider this application after putting Notice of Accusation to accused, at the stage of or after calling for further evidence of complainant, if any, to be filed/led on behalf of complainant in support of his case.

33 Petition is allowed in aforesaid terms with direction to parties to appear before the trial Judge on ***11.01.2021*** whereafter the trial Judge shall proceed further in accordance with law as discussed above. Record be sent back immediately.

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

Karamvir ...Petitioner

Versus

Narcotic Control Bureau Chandigarh ....Respondent

Cr.MP(M) No. 1206 of 2020
Judgment Reserved on2nd Dec., 2020
Date of Decision 07th Dec, 2020

Code of Criminal Procedure, 1973:- Section 439 Cr.PC- FIR under Sections 8, 20,25,28,29 & 60 of ND&PS Act, P. S. NCB Chandigarh- Recovery of 8 Kg 750 gms charas and 1.020 kg opium from accused Kuldeep and Hardeep being transported in Mahindra Pik up bearing HP -12-J-4403- Petitioner is receiver of the contraband- Enlargement sought on health grounds and that he (petitioner) is implicated only on the basis of statement under section 67 NDPS Act which cannot be used in trial- Held, that role of petitioner in procuring, trafficking or selling charas/opium was based on prior information, leading to recovery of contraband substantiated by CDR record- Petitioner on regular medication and treatment in Jail- Nature and gravity of offence, impact thereof on society and in view of quantum of contraband recovered, petitioner not entitled for bail- Petition dismissed. (Paras 11,12,15,17,19)

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

For the Respondent: Mr.Ashwani Pathak, Sr. Advocate with Mr.Sandeep Sharma, Advocate, through Video Conferencing.

Mr. Desh Raj Thakur, Additional Advocate General and Mr.Raju Ram Rahi, Deputy Advocate General, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Petitioner has preferred this petition, under Section 439 Cr.P.C., seeking regular bail in case Crime No. 66 of 2019, dated 7.11.2019 registered under Sections 8, 20, 25, 28, 29 and 60 of Narcotic Drugs and Psychotropic Substances Act, (hereinafter referred to as 'NDPS Act') in Police Station Narcotics Control Bureau,Chandigarh, District Chandigarh.

2 Prosecution case, as evident from copy of complaint filed with petition, is that on 7.11.2019, a specific information was received by Rajan Singh Bisht, Surveillance Assistant NCB through reliable source with respect to trafficking of charas and opium, which was reduced into writing by him and put up before Superintendent NCB Chandigarh at 01.05 PM, whereupon Superintendent NCB had instructed to constitute a team to take further necessary action as per law.

3 As per information, two persons, namely Kuldeep and Hardeep, both resident of Mani Majra Chandigarh, were engaged in charas and opium trafficking and they had been transporting a huge consignment of charas and opium on that day, received from one Dev Raj, resident of Banjar to deliver it to one Karamvir @ Landa resident of Pinjore (petitioner) by using Mahindra Pickup vehicle bearing No. HP-12J-4403 and they were likely to reach at Toll Barrier Baddi between 4 PM to 5 PM.

4 It is the case of prosecution that on 7.11.2019 at about 2.45 PM, the team constituted by Superintendent NCB reached at Toll Barrier Baddi Himachal Pradesh and contacted Police Station Baddi with request to provide two independent witnesses. Further that despite best of efforts made by the team, no one from the local public had agreed to witness the search and seizure proceedings, but, at about 3.45 PM, two police officials namely Akram Khan and Shiv Kumar Constables, posted in Police Station Baddi, had approached the scene. Both of them were introduced to NCB team by Investigating Officer and were made aware of secret information. Both of them were requested, in writing, to witness the search and seizure proceedings for which they had agreed.

5 According to prosecution, at about 4.45 PM Mahindra Pickup, matching with secret information, reached the Toll Barrier which was stopped and person sitting at driver's seat, on inquiry had introduced him as Kuldeep son of Gafur, resident of Mani Majra and person sitting besides him had disclosed his name as Hardeep Kumar son of Harish Kumar. They were taken to nearby barrier of Excise and Taxation Office and Investigating Officer had introduced himself and his team members including independent witnesses to them by showing Identity Cards and also about the secret information received by him with respect to trafficking of charas and opium by both of them and therefore, expressed the intention to search the vehicle Mahinder Pickup van.

6 It is further case of prosecution that during search of pickup van, at first instance, nothing was recovered. However, on stern inquiry, both of them had confessed that they had concealed the charas and opium in a special cavity made at backside of pickup, below the registration number plate whereupon pickup van was again searched and both of them had removed the number plate and had taken out 10 silver colored packets and informed that one of those packets was containing opium, while other nine were containing charas.

7 Recovered contraband was weighed and seized by following the procedure provided under NDPS Act and total recovered charas was found 8 Kg. 750 grams and recovered opium was found 1.020 Kg.

8 On 8.11.2019 Karamvir petitioner was served with summons under Section 67 of NDPS Act and his house as well as his vehicle Car No. CH-01BU-2516 were searched. Besides other articles, three mobile phones, a silver small weighing machine and an electronic compact scale were also recovered and seized from his residence. During investigation, on 8.11.2019 voluntary statements under Section 67 of NDPS Act of all i.e. Kuldeep, Hardeep and Karamvir were recorded by Investigating Officer, after explaining about their right that they were not bound to give any statement and they were at liberty to remain silent and any statement, if given by them, could be used against them or against anybody-else as evidence in Court.

9 According to prosecution, in their statements, all of them had accepted their guilt and role in procurement and trafficking the seized contraband. Based on voluntary statements, all of them were arrested on 8.11.2019.

10 It is case of prosecution that during investigation, call detail reports (CDRs) of mobile phones of trio were also obtained and it was found that mobile numbers 78075-30188, 62303-49337, 88940-41593 were being controlled by Karamvir petitioner, whereas mobile numbers 86278-86848 and 86278-67931 were being controlled by Kuldeep and Dev Raj respectively. Analysis of CDRs of these numbers had established the link between petitioner Karamvir (receiver), carrier Kuldeep and Hardeep, and supplier Dev Raj.

11 Learned counsel for petitioner has canvassed for enlargement of petitioner on bail on two grounds. First ground is that petitioner is entitled for bail on health ground and vide application Cr.MP No. 1475 of 2020, documents/prescription slips of treatment of petitioner were also placed on record on behalf of petitioner, whereupon, Mr. Desh Raj Thakur, learned Additional Advocate General was requested to assist the Court by having report of Superintendent Jail, Model Central Jail Nahan as well as Medical Officer of Jail.

12 In response thereto, Mr. Raju Ram Rahi, learned Deputy Advocate General has placed on record communication received from Superintendent Jail, Model Central Jail, Nahan HP along with report and photocopies of documents, wherein, it has been reported that

petitioner was admitted to Model Central Jail Nahan on 14th March, 2020 after transferring him from District Jail, Solan and on medical examination, he was found suffering from CAD (Coronary Artery Disease), Hypertension and Psychiatric illness for which as per his Jail Medical Record, he was already under treatment. Further that petitioner has been suffering from CAD since 2017 and has underwent Stenting Procedure for same on 19.9.2017 at PGI and was discharged on 22.9.2007 and he is on regular medication and constant follow up.

13 Lastly, it is reported that petitioner is on regular medication, and proper treatment and care is being provided to him by Jail Authorities and currently, he is stable and doing well in jail.

14 To substantiate the report of Superintendent Jail, opinion of Medical Officer of Jail has also been placed on record.

15 Considering the report of Superintendent Jail of Model Central Jail coupled with contents of opinion of Medical Officer, I do not find any sufficient reason for enlarging the petitioner on bail on health ground.

16 Second ground for enlarging the petitioner on bail is that he has been implicated in present case only on the basis of statement under Section 67 of NDPS Act, whereas on the basis of statement of Section 67 of NDPS Act, as held by Apex Court in Criminal Appeal No. 152 of 2013, titled Tofan Singh vs. State of Tamil Nadu, decided on 29.10.2020, a statement recorded under Section 67 of NDPS Act cannot be used as a confessional statement in the trial of an offence under NDPS Act.

17 There is no dispute with respect to law laid down by the Supreme Court, relied upon by petitioner. However, as a matter of fact in present case petitioner has not been involved in the case only on the basis of statement recorded under Section 67 of NDPS Act, but, as claimed by prosecution, a prior information about his involvement in procuring, trafficking and selling the charas and opium was received by a Surveillance Assistant of NCB on 7.11.2019, which was reduced into writing and placed before the Officer of rank of Superintendent NCB whereupon a team was constituted and that information was substantiated on recovery of charas and opium from vehicle wherein Kuldeep and Hardeep (accused) were found transporting the contraband and involvement of Karamvir petitioner has further been substantiated by CDRs record and also on recovery of a silver small weighing machine and electronic compact scale from his residence and therefore, it is not a case where petitioner has been involved only on basis of voluntary statement recorded under Section 67 of NDPS Act or only on the basis of disclosure statement made by co-accused. Therefore, plea of petitioner on this count is not sustainable.

18 Veracity of evidence narrated by prosecution is to be evaluated by trial Court. Facts of prosecution case and contentions of petitioner have been reproduced herein-above only for bringing the necessary facts on record, which were essential to be considered for adjudication of this petition.

19 Without commenting upon merits of prosecution case as well as contentions raised by petitioner, but for nature and gravity of offence, impact thereof on society and quantum of contraband recovered and also that petitioner has not been involved only on the basis of statement made under Section 67 of NDPS Act, I do not find any reason for enlarging the petitioner on bail at this stage.

20 In view of above, petition is dismissed. Any observation made in this order shall not affect the merits of case in any manner and will strictly confine for the disposal of this bail application.

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

Nisha Thakur ....Petitioner.

Vs.

Radha Devi and others .....Respondents.

CWP No. 827 of 2020
Reserved on: 02.11.2020
Date of Decision: 03.12.2020

Constitution of India, 1950:- Article 226:- Election petition filed by Smt. Radha Devi against elected Pradhan allowed by Appellate Authority- Appeal dismissed by Deputy Commissioner- Writ petition preferred on the ground that election petition was defective and appeal not maintainable- Held, that Election petition not verified at the foot by Election petitioner nor accompanied by an affidavit in support of pleadings as required under Order VI, Rule 15 (4) CPC on prescribed form in Form-43 H.P Panchyati Raj (Election) Rules 1991- Election Petition filed by election petitioner per se defective as purported affidavit sworn in favour of election petitioner pre-dates the election petition- Writ petition allowed- Orders dated 2.3.2019 passed by SDO (Civil) and order dated 9.1.2020 passed by Deputy Commissioner in appeal set aside- Respondent /State directed to allow the petitioner to perform her duties as Pradhan G.P Hinner. (Paras 17, 25, 28).

Cases referred:

G.M. Siddeshwar Vs. Prasanna Kumar (2013) 4 Supreme Court Cases 776;

For the petitioner: Mr. Sudhir Thakur, Senior Advocate,
with Mr. Karun Negi, Advocate.

For the respondents: Mr. Vipin Pandit, Advocate, for respondent No. 1.

None for respondents No. 2 to 4.

Mr. Dinesh Thakur, Additional Advocate General, with Ms. Divya Sood, Deputy Advocate General, for respondents No. 5 and 6.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral):

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

> *"(I) To quash and set aside impugned order Annexure P-5 dated 09.01.2020 and Annexure P-4 dated 02.03.2019 passed by Ld. Authorized Officer and Ld. Appellate Authority under the H.P. Panchayati Raj Act, 1994, respectively being wrong and illegal.*
> *(II) To declare the election of the petitioner for the post of Pradhan, Gram Panchayat, Hinner to be legal and valid.*
> *(III) To direct the Director, Panchayati Raj, H.P., Shimla (Respondent No. 6) not to take any action on the basis of the order passed by the Ld. Lower Courts".*

2. The case of the petitioner is that she is a resident of Village Kurgal, Post Office Hinner, Tehsil Kandaghat, District Solan, H.P. Elections for the post of Pradhan, Gram Panchayat Hinner were held in December, 2015, in which, the petitioner was declared elected as Pradhan, Gram Panchayat Hinner, Tehsil Kandaghat, District Solan, H.P. An Election Petition was filed by Smt. Radha Devi (i.e., respondent No. 1 herein) under the Himachal Pradesh Panchayati Raj Act, 1994 (hereinafter referred to as "the 1994 Act"), *inter alia*, on the grounds that nomination was not properly filed by the petitioner nor did the same confirm to the mandatory instructions and declarations made by her in the nomination paper were incorrect, real facts stood concealed and mis-represented, false and fabricated description of papers stood made by the petitioner in the nomination papers and further, the elected Pradhan, i.e., the petitioner was involved in unfair election practices alongwith her family members. According to the election petitioner, the elected Pradhan and her family members distributed money, liquor and utensils during election period. Police and electoral staff failed to discharge their duties in consonance with law and persons almost 50 in numbers, who were not eligible to cast their vote, were permitted to do so to the deterrent of the election petitioner, despite her objections and objection of her Polling Agent. The election petitioner was not allowed to appoint a Counting Agent and the official machinery sabotaged the election process, because the voting was not held in a lawful manner.

3. The election petition was resisted by the elected candidate, *inter alia,* on the ground of maintainability, cause of action and the principle of estoppal etc. It was denied by

the elected candidate that she had indulged in any concealment of facts in the nomination paper or there was any infirmity in the nomination paper so filed by her. It was denied in the reply that the elected Pradhan had indulged in any unfair practice in the process of election or free or fair election was not allowed by the election machinery etc.

4. Vide order dated 02.03.2019 (Annexure P-4), passed by the Sub-Divisional Officer (Civil)-cum-Appellate Authority (Election Petition), Kandaghat, District Solan in Case No. 01/2016, titled as *Smt. Radha Devi Vs. Smt. Nisha Thakur and others*, the petition filed by the election petitioner against the nomination and election of the elected Pradhan was allowed by returning the following findings:

> *"21. In view of my findings given on issues from 1 to 9, Court is of the view that the nomination paper of the respondent No. 1 Smt. Nisha Devi has not been scrutinized as per norms and provisions of H.P. Panchayati Raj Act, 1994 and Himachal Pradesh Panchayati Raj Election Rules, 1994 in which the respondent has concealed the material facts in the Undertaking/Affidavit annexed alongwith Nomination papers. Further the nomination paper filed by Smt. Nisha Thakur, Respondent No. 1 bears many irregularities and was liable to be rejected which was wrongly accepted by ARO (Respondent No. 2). In view of the above discussion, I am of the construed opinion that the petitioner has due merits therefore allowed. The election of Pradhan Gram Panchayat Hinner held on 01.01.2016 are set aside and declared null and void under Section 174(1-b) of Himachal Pradesh Panchayati Raj Act, 1994 and fresh election for the post of Pradhan Gram Panchayat Hinner be got conducted as per H.P. Panchayati Raj Act, 1994 and H.P. Panchayati Raj Election Rules, 1994. Further warning be issued to the erring official ARO Daleep Singh for not conducting the election as per Himachal Pradesh Panchayati Raj Act, 1994 and as per Himachal Pradesh Panchayati Raj Election Rules, 1994. Case file be consigned to general record room after due completion."*

5. Appeal filed by the Elected Pradhan under Section 181 of the 1994 Act against the order so passed by learned Sub-Divisional Officer (Civil)-Cum-Appellate Authority was dismissed by the Appellate Authority, i.e., Deputy Commissioner, Solan on 09.01.2020 (Annexure P-5) vide Appeal No. 3/8 of 2019, titled as *Nisha Thakur Vs. Radha Devi and others* by returning the following findings:

> *"11. In the light of points discussed herein before I am led to conclude and established that the nomination paper was incomplete and appellant concealed the facts as discussed in forgoing paras. The ARO has also acted in a casual manner and wrongly accepted the nomination papers and further the ARO has not*

complied with his satutory duies and instruction, therefore, there is no justification for setting aside the impugned order. Impugned order passed by the Sub-Divisional Officer (Civil)-Cum-Appellate Authority (Election Petition) Kandaghat, in Case No. 1/2016 decided on 02.03.2019 titled as Smt. Radha Devi versus Smt. Nisha Thakur and others is upheld. The appeal is therefore dismissed. The election of Pradhan Gram Panchayat Hinner held on 01.01.2016 are set aside and declared null and void. Copy of this order be sent to the Director Panchayati Raj, H.P. Shimla for conducting the fresh election for the post of Pradhan, Gram Panchayat Hinner and disciplinary authority of respondent No. 2, be directed to initiate the proceedings against the respondent No. 2 ARO for not conducting the Election as per the provisions of H.P. Panchayati Raj Act, 1994. Case files received from the office of Sub-Divisional Officer (Civil)-Cum-Appellate Authority (Election Petition), Kandaghat is ordered to be returned back to him alongwith a copy of these orders. Case file of this office be consigned to General Record Room after due completion."

6. Feeling aggrieved, the elected Pradhan has preferred this petition praying for the reliefs already enumerated hereinabove.

7. Learned Senior Counsel for the petitioner has primarily argued that this petition deserves to be allowed by setting aside the orders impugned on the sole ground that the election petition which was so filed by the election petitioner was defective and not as per the statutory mandate of the 1994 Act read with relevant Rules framed thereunder. Though learned Senior Counsel has made submissions on merit also, however, as argued and agreed, this Court is firstly going to adjudicate the issue as to whether the election petition filed by the election petitioner, was filed in the manner as prescribed under Section 163 of the 1994 Act and if not, whether the same was liable to be dismissed on account of the defects therein or not?

8. At this stage, this Court will also refer to one objection which has been taken by learned counsel appearing for Radha Devi, i.e., the election petitioner, who has contended that the present petition cannot be heard, as the appeal which was filed by the present petitioner, against the oder so passed by the Sub-Divisional Officer (Civil)-Cum-Appellate Authority, was not maintainable, as the same was not accompanied with the treasury challan. Said objection shall be dealt with by me at the appropriate stage.

9. As mentioned above, learned Senior Counsel for the petitioner has argued that the authorities below have erred in not appreciating that the Election Petition, which was filed by the election petitioner, was defective and same was thus liable to be dismissed on this count alone and same could not have been decided on merit.

10. Though this plea does not finds mention in the petition in so many words, yet as it is a legal plea, the same was permitted to be raised and parties were heard at length on the same.

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

12. Section 163 of the 1994 Act provides that any elector of a Panchayat may, on furnishing the prescribed security in the prescribed manner, present within thirty days of the publication of the result, on one or more of the grounds specified in Sub-section (1) of Section 175, to the Authorised Officer an election petition in writing against the election of any person under the Himachal Pradesh Panchayati Raj Act, 1994. Section 164 of the said Act deals with contents of petition. This statutory provision reads as under:

> *"164. Contents of petition. -(1) An election petition-*
> *(a) shall contain concise statement of the material facts on which the petitioner relies,*
> *(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice, and*
> *(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:*
> *Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.*
> *(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition."*

13. As this Court is confining itself to the question of maintainability of Election Petition, therefore, it is not further dwelling on the statutory provisions, as are contained in Section 175 of the 1994 Act, which deal with grounds for declaring election to be void.

14. Section 164 of the 1994 Act, *inter alia,* provides that an Election Petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 for the verification of pleadings. Proviso thereto contains that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and particulars thereof.

15. Order VI, Rule-15 of the Code of Civil Procedure deals with verification of pleadings and the same provides as under:

> *"Order VI, Rule-15. Verification of pleadings: (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.*
> *(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.*
> *(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.*
> *(4) The person verifying the pleading shall also furnish an affidavit in support of his pleadings."*

16. Now, in the background of the abovementioned statutory provisions, this Court will look into the Election Petition, as it stood filed by the election petitioner before the Authorized Officer. Copy of the Election Petition is appended with this writ petition as Annexure P-1. This Court had directed the office of learned Advocate General to produce the original record of the Election Petition, which has been made available by the learned Additional Advocate General.

17. A perusal of the original record demonstrates that Election Petition was presented by one Shri Ashish Thakur, learned counsel for the election petitioner before the Authorized Officer on **29.01.2016 and was signed by the petitioner on the same date** as well as learned counsel appearing for the election petitioner. **The Election Petition has not been verified at the foot by the election petitioner**. In the absence of Election Petition having been verified at the foot, there is no compliance of Order VI, Rule-15(2) of the Code of Civil Procedure. It is not mentioned in the Election Petition as to at which place the same was prepared and signed by the election petitioner, as the Election Petition is conspicuously silent with regard to the place of its preparation/having been signed by the election petitioner.

18. Be that as it may, the Election Petition is also not accompanied by an affidavit in support of the pleadings of the Election Petition *per se,* as is contemplated under Order VI, Rule 15(4) of the Code of Civil Procedure. However, as per the original record, there is at Pages No. 619-620 thereof an affidavit of Smt. Radha Devi, wife of Shri Tapender Pal, i.e., the election petitioner, which is executed on a Non-Judicial stamp paper of ten rupees value. The contents of said affidavit are being reproduced hereinbelow in toto for ready reference:

"AFFIDAVIT

I, Radha Devi, wife of Sh. Tapender Pal, resident of Village Rahed, P.O. Hinner, Tehsil Kandaghat, District Solan, H.P. aged about 56 years, the petitioner in the accompanying election petition calling in question the election of Smt. Nisha Thakur from Gram Panchayat Hinner as Pardhan, Gram Panchayat Hinner, Tehsil Kandaghat, District Solan, H.P. in the said petition, make solemnly affirm and oath as says:

That the statements made in the paragraphs No. 3 to 7 of the accompanying election petition about the commission of corrupt practice of wrong counting of votes and wrong declarations and particulars of such corrupt practices mentioned in the paras are true to my knowledge.

Deponent

Verification:-

I, the abovenamed deponent do hereby verify that the contents of my above affidavit are true and correct to the best of my personal knowledge and belief. No part of it is false and nothing has been concealed therefrom.

Verified at Solan on this 28th day of January, 2016.

Deponent."

19. **Now, incidentally, this affidavit is prepared on a Non-Judicial stamp paper of ten rupees value, which was purchased on 28.01.2016 and has been attested by the Executive Magistrate, Solan, District Solan on the date of preparation of the affidavit, i.e., 28.01.2016. To make more clear, the backside of the affidavit demonstrates that the affidavit was attested by the Executive Magistrate, Solan on 28.01.2016. Contents of the affidavit have already been reproduced hereinabove in toto.**

20. Before proceeding further, this Court again wants to make a reference to proviso of Section 164(1) of the 1994 Act, wherein, it is provided that in the event of corrupt practice being alleged in the Election Petition, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof. Now, the 'prescribed form' in this regard is Form-43 appended with the Himachal Pradesh Panchayati Raj (Election) Rules, 1994, in terms of the provisions of Rule-94(3) of the above mentioned Rules. The same is also being quoted hereinbelow in toto for ready reference:

"FORM-43

I……the petitioner in the accompanying election petition calling in question the election of Shri/Shrimati……from

…….respondent No. ……..in the said petition make solemn affirmation/oath and say:-

(a) that the statements made in paragraphs……of the accompanying election petition about the commission of corrupt practice of ……and the particulars of such corrupt practice mentioned in paragraphs……..of the Schedule annexed thereto are true to my knowledge;

(b) that the statement made in paragraphs……of the said petition about the commission of the corrupt practice of……and the particulars of such corrupt practice given in paragraphs……..of the said petition and in paragraphs……of the Schedule annexed thereto are true to my knowledge.

(c)

(d)

Signature of Deponent.

Solemnly affirmed/sworn by Shri/Shrimati…….at this (…….day of ……..20….)

before me.

Executive Magistrate.

……

Here insert one of the following alternatives as may be appropriate:-

(1) Office of Member from…….constituency of Gram Sabha……

(2) Office of Pradhan of ……..Gram Sabha.

(3) Office of Up-Pradhan of ……Gram Sabha.

(4) Office of Member of ……..Panchayat Samiti from……..constituency.

(5) Office of Chairman of ……..Panchayat Samiti/Zila Parishad.

(6) Office of Vice-Chairman…….Panchayat Samiti/Zila Parishad.

Here specify the name of the corrupt practice."

21. If one corelates the contents of Form-43 with the contents of the affidavit, which was sworn in by the election petitioner before the Executive Magistrate, Solan, the same, by no stretch of imagination, can be said to be in consonance with the contents of Form-43. Besides, one more glaring defect on the face of it, which demonstrates that the Election Petition filed by the election petitioner was *per se*defective and could not be termed to be a petition, as is envisaged under Section 163 of the 1994 Act is that, as already mentioned hereinabove, the Election Petition was prepared on 29.01.2016 and signed by the election petitioner also on 29.01.2016, however, the affidavit purportedly sworn in before the Executive Magistrate in support of the said Election Petition is dated and attested on 28.01.2016. **In other words, the affidavit purportedly prepared in support of the Petition came into existence even before the Election Petition, in support whereof, this affidavit was sworn in, was actually prepared and signed.** During the course of arguments, learned counsel appearing for the election petitioner/private respondent No. 1 herein, was pointedly asked by the Court to explain this fact, which he could not to the

satisfaction of the Court. The above facts, in my considered view, clearly prove and establish that the Election Petition, which was filed by the election petitioner, challenging the election of the present petitioner before the Authorized Officer was defective and was not in terms of the provisions of Section 163 of the 1994 Act and this extremely important aspect of the matter has been overlooked and not gone into by the Authorized Officer while deciding the Election Petition. After the amendment incorporated in the Code of Civil Procedure, whereby, now it is mandatory that a Civil Suit, besides being verified, is also to be accompanied by an affidavit, the same entails the plaint to be attested by the Oath Commissioner alongwith the affidavit. In this case, the Election Petition has not been attested by the authority, which attested the affidavit, purportedly sworn in, in support of the Election Petition. Even if this aspect of the matter is to be ignored by the Court, yet, the factum of the purported affidavit sworn in, in support of the election petition having been prepared on 28.01.2016, whereas the Election Petition being prepared and signed on 29.01.2016, cannot be overlooked and ignored by this Court while holding that the Election Petition when filed, was a defective Election Petition. This Court appreciates that there can be a situation where after preparation of the petition, the affidavit is prepared in support thereof, may be a day or so later after the petition is prepared, however, there cannot be a situation wherein an affidavit in support of a petition can come into existence even before the actual petition is prepared, because in the absence of the petition being there, the deponent cannot know as to what he or she is swearing in by way of affidavit in support of the petition.

22. This Court is aware that Hon'ble Supreme Court in ***G.M. Siddeshwar*** Vs. ***Prasanna Kumar*** (2013) 4 Supreme Court Cases 776 has been pleased to hold that if an election petition is accompanied by an affidavit, may be defective, then the same is to be taken as substantial compliance with the requirements of law and if the defect is curable, opportunity has to be granted to the petitioner to cure the defect. However, in my considered view, this judgment does not come to the rescue of the election petitioner in this case, because as already mentioned hereinabove, the purported affidavit sworn in, in favour of the election petitioner pre-dates the Election Petition, which cannot be said to be substantial compliance of law nor it can be said that the Election Petition accompanied with a pre-dated affidavit entails such defect which can be termed to be curable. It appears that no one took the care or the pain to scrutinize the Election Petition, as it ought to have been done, which has resulted in grave miscarriage of justice to the present petitioner, as she stands non-suited on the basis of a defective Election Petition, which not only stood entertained by the Authorized Officer, but also adjudicated upon on merit.

23. Incidentally, when one peruses the issues which stood framed in the course of adjudication of the Election Petition by the Authorized Officer, one finds that Issue No. 6 was to the effect as to whether the petition was maintainable or not?. The issue with regard to

maintainability of the petition has been decided by the Authorized Officer in a completely slipshod manner by returning the following findings:

> ***"ISSUES No. 6, 7, 8 and 9:***
>
> *20. As Issue Nos. 1, 4 and 5 have already been proved to be true hence the respondents failed to prove the non maintainability of the present petition. The case has been proved beyond doubt that the allegations levelled by the petitioner have been proved to a greater extent. Hence the case is maintainable and liable to be accepted. As the petitioner was part of the election process being contesting candidate and she has every right to fight for any type of irregularities conducted in the election process which affects the result. It has been alleged by the counsel for respondents that the petitioner had not raised the issues as and when these arise and now when the issues were not raised at appropriate time then the cause of action does not arise. The counsel for the petitioner in its rejoinder explained that Respondent No. 2 the then ARO had not made petitioner part of election process in lawful manner and made her to suffer totally in contravention to the principal of natural justice and fair play. Further PW-1 in her cross-examination has alleged that they tried to file the objections but the same were not accepted by the ARO this has also been verified by RW-2 that ARO did not receive the counting agent form. The petitioner has valid cause of action against the respondents as the whole scenario had changed by the wrong acceptance of the nomination form in respect of Respondent No. 1. Had the nomination paper of the respondent No. 1 not been accepted, petitioner would have won the election. As far as the issue of non joining of the parties is concerned, the petition has properly been scrutinized and was found in order thereafter the application was accepted. Keeping in view the issue Nos. 6 to 9 could not be proved in favour of respondents and against the petitioner."*

24. This Court again stresses that the Authorized Officer ought to have been vigilant enough while entertaining, hearing and deciding the Election Petition qua the infirmities which were there in the Election Petition and which were *ex facie* evident.

25. Accordingly, as this Court finds that the Election Petition which was filed by election petitioner/respondent No. 1 herein, was *per se*defective and was not maintainable, the order dated 02.03.2019, which has been passed thereupon, but obvious, is null and void and is liable to be quashed and set aside and so also order dated 09.01.2020, passed in appeal by the Appellate Authority, vide which said order was confirmed.

26. Though a catena of judgments were cited by both the learned counsel for the parties with regard to the scope of this Court while deciding a Writ Petition inelection matter,

but this Court is not referring to those judgments, because this Court has not gone into the merits of the orders which stood passed by the authorities below, either in the Election Petition or the Appeal.

27. As far as the objection taken by learned counsel for respondent No. 1 herein that as treasury challan was not appended with the appeal, therefore, this petition cannot be heard on merit is concerned, in my considered view, this Court while discharging its duties in exercise of powers conferred under Article 226 read with Article 227 of the Constitution of India, cannot permit an illegality to remain on record, especially in exercise of its power of superintendence. This Court has come to the conclusion that the Election Petition filed by the election petitioner was not maintainable, as the same was defective and the order which stood passed on the said Election Petition was *void abinitio* and therefore, this Court cannot allow the said *void* order to remain on record. Even otherwise, such objection was not taken by the respondent before the appellate authority and she was further satisfied with adjudication on the same on merit.

28. Accordingly, in view of the discussions held hereinabove, this writ petition is allowed. Order dated 02.03.2019 (Annexure P-4), passed by learned Sub-Divisional Officer (Civil)-Cum-Appellate Authority (Election Petition), Kandaghat, District Solan in Case No. 1/2016, titled as *Smt. Radha Devi Vs. Smt. Nisha Thakur and others* and order dated 09.01.2020 (Annexure P-5), passed by learned Deputy Commissioner, Solan in Appeal No. 3/8 of 2019, titled as *Nisha Thakur Vs. Radha Devi and others* are quashed and set aside. Respondent-State is directed to allow the petitioner to perform her duties as Pradhan, Gram Panchayat Hinner without any fetters. Miscellaneous applications, if any, also stand disposed of. No order as to costs.

BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Surinder Kumar .....Petitioner.

Versus

Sham Sunder & ors. .....Respondents.

CMPMO No. 520 of 2019
Reserved on: 01.12.2020
Decided on: 03.12.2020

Code of Civil Procedure, 1908:- Order 1 Rule 10 (2) read with section 151- Civil suit filed by S/ Shri Sham Sunder and Jaram Singh seeking possession of suit land decreed ex-parte- Judgment and decree set aside by Ld. District Judge and trial court directed to decide matter afresh- Original Proforma defendant No.7 moved an application under order 1 rule 10 read with section 151 CPC for **transposing** as co-plaintiff having purchased portion for suit land- Trial

court allowed the application- Revision in the High Court- Held, that claim of proforma defendant having purchased parts of suit land during pendency of litigation not disputed- Proforma defendent No. 7 acquired interests common to the plaintiff and by his transposition as co-plaintiff, nature and scope of civil suit will not be changed- No error in impugned order passed by Ld. trial court- Petition dismissed. (Paras 3 & 4).

Cases referred:

Gurmit Singh Bhatia v. Kiran Kant Robinson and others, AIR 2019 Supreme Court 3577;
Kasturi vs. Iyyamperumal (2005) 6 SCC 733;
R. Dhanasundari vs. A.N. Umakanth & ors., 2019(4) Scale 161;
Bhupendra Narayan Sinha Vs. Rajeshwar Prasad AIR 1931 PC 162;

For the petitioner	:	Mr. R.L. Chaudhary, Advocate.
For the respondents	:	Ms. Vandana Kumari, Advocate, vice Mr. Sanjay Jaswal, Advocate, for respondent No. 1. Mr. Mukul Sood, Advocate, for respondents No. 7 and 8. None for respondents No. 5, 12 and 13 though served. Respondents No. 2,3,6,9,10,11,14 and 15 stated to have expired.

(Through Video Conferencing).

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, *Judge*

An application moved by one Shri Subhash Chand Puri (original proforma defendant No. 7) under Order 1 Rule 10(2) read with Section 151 of Code of Civil Procedure for transposing him as co-plaintiff has been allowed by the learned trial Court vide order dated 12.6.2019. Aggrieved defendant No. 1 (Surinder Kumar) has preferred instant petition under Article 227 of Constitution of India.

2. From the record of civil suit, it becomes apparent that 'the memo of parties' of the present petition has not been drawn correctly. The changes made before the learned trial Court in 'the memo of parties' have not been properly incorporated in the instant petition. Be that as it may. Perusal of record and the impugned order reflect that the dispute raised in present petition only concerns Surinder Kumar (original defendant No. 1), Sham Sunder (original plaintiff) and Subhash Chand Puri (original defendant No.7). In fact, for deciding the application culminating in the impugned order, the notice was confined by the learned trial Court only to these parties. Therefore, irrespective of the fact that 'memo of parties' has not been drawn correctly and some of the respondents (herein) are not served, yet considering the

narrow compass of controversy raised in the instant petition coupled with the fact that original civil suit was filed almost 31 years ago, which has not progressed after 16.10.2019 due to requisitioning of its record in the instant petition, the requirement of service of unserved respondents is dispensed with. Therefore, CMP No. 11211 of 2020, CMP(M) No. 724 of 2020 and CMP(M) No.725 of 2020 are not being considered in the interest of justice and stand disposed of accordingly. The parties affected and interested in the order impugned herein, are represented by their learned Counsel. Considering all these aspects, the matter is heard today with the consent of learned Counsel for the parties affected by the impugned order.

3(i) A civil suit bearing No. 180/1991 was filed by S/Shri Sham Sunder and Jaram Singh in the learned trial Court seeking possession of land comprised in Khata No. 14 min, Khatauni No. 21 min, Khasra No. 747/1, measuring 0-00-44(2 marlas) out of Khasra No. 747 measuring 0-01-50 HM, situated in Tika and Mauza Jassur, Tehsil Nurpur, District Kangra. In the civil suit, petitioner-Shri Subhash Chand Puri was arrayed as proforma defendant No. 7. Defendants No. 3 to 7 admitted the claim of plaintiffs. Defendant No. 1 prayed for dismissal of suit. The suit was decreed ex-parte in favour of plaintiffs vide judgment and decree dated 25.10.1997. Defendant No. 1 (petitioner herein) was to demolish the shed constructed by him over the foundations laid by plaintiff No. 1. Plaintiff Sham Sunder thereafter filed an execution petition No. 8/2006 for possession of half share of suit land. Subsequently defendant No. 1 moved an application under Order 9 Rule 13 CPC for setting aside ex-parte decree dated 25.10.1997. The application was dismissed by the learned trial Court on 24.1.2009 for want of prosecution.

3(ii) The judgment and decree dated 25.10.1997 was set aside by learned District Judge on 4.10.2012 on the ground that it was passed against dead persons. Accordingly, the trial Court was directed to decide the matter afresh.

3(ii) Original proforma defendant No. 7 moved an application under Order 1 Rule 10 read with Section 151 of CPC for transposing himself as co-plaintiff. The basis for moving this application, as averred in the application, was that he had bought half portion of the suit land measuring 0-00-21 HM having two shops and a staircase for sale consideration of `35000/- qua Khasra No. 747/1 measuring 0-00-44 HM including half portion which allegedly was in illegal possession of defendant No. 1(petitioner herein), vide sale deed No. 747 dated 29.4.2005. It was averred in the application that having purchased the aforesaid suit land the applicant had become owner of the suit land and, therefore, has common interest with that of plaintiff Sham Sunder. On this basis, he prayed for his transposition as co-plaintiff for taking the possession of the suit land from defendant No. 1. This prayer was opposed by defendant No. 1 by taking various objections which inter-alia pertained to locus-standi of proforma defendant No. 7 in

maintaining the application. On merits also, purchase of suit property by proforma defendant No. 7 was denied. Learned trial Court vide order dated 12.6.2019 allowed the application and transposed original proforma defendant No. 7 as co-plaintiff. Aggrieved defendant No. 1 has preferred instant petition.

4. I have heard learned counsel for the petitioner (original defendant No.1), respondent No. 1 (original Plaintiff) as well as respondent No. 8(original proforma defendant No. 7) and gone through the record.

It is not in dispute that Shri Subhash Chand Puri was originally arrayed as proforma defendant No. 7 in the civil suit. He moved the application for his transposition as co-plaintiff on the ground of having purchased the suit property as described above. It is the plaintiff who has the *dominus litis.* It is for the plaintiff to choose his opponents as well as his co-plaintiffs. The record of civil suit shows that the plaintiff did not oppose the transposition of proforma defendant No. 7 as co-plaintiff alongwith him. It was a civil suit for possession. When the plaintiff did not have any objection to the prayer made by proforma defendant No. 7 for his transposition as co-plaintiff, then, in the facts and circumstances of the case and considering nature of civil suit, the transposition of Subhash Chand Puri as co-plaintiff was justified. More particularly when objections of defendant No. 1/petitioner against transposition of proforma defendant No. 7 as co-plaintiff primarily pertained to merits of main matter inasmuch as defendant No.1 has alleged that lease deed in favour of original plaintiffs had expired. This objection has been countered with the submission that lease has been further renewed and that proforma defendant has purchased the suit property described above.

Reference in this regard can be made to ***AIR 2019 Supreme Court 3577***, titled ***Gurmit Singh Bhatia*** v. ***Kiran Kant Robinson and others,*** wherein Hon'ble Apex Court followed an earlier judgment in case of **Kasturi** vs. **Iyyamperumal (2005) 6 SCC 73**3 where it was observed that order I Rule 10 CPC to add a party in the suit cannot be invoked unless the party proposed to be added has direct and legal interest in the controversy involved in the suit. Two tests were laid down for determining the question as to who is necessary party viz:-(1) there must be a right to some relief against such party in respect of controversy raised in the proceedings; (2) no effective decree can be passed in absence of such party. It was further observed that a party claiming an independent title and possession adverse to the title of the vendor and not on the basis of the contract, in a civil suit for performance, is not a proper party. Addition/impleadment of such party shall enlarge the scope of civil suit for specific performance to suit for title and possession, which is impermissible. Relevant extracts from *Gurmit Singh Bhatia's* case supra are reproduced hereinunder:

> *"5.2 ……. That thereafter, after observing and holding as above, this Court further observed that in view of the principle that the plaintiff who*

has filed a suit for specific performance of the contract to sell is the dominus litis, he cannot be forced to add parties against whom, he does not want to fight unless it is a compulsion of the rule of law. In the aforesaid decision in the case of Kasturi (supra), it was contended on behalf of the third parties that they are in possession of the suit property on the basis of their independent title to the same and as the plaintiff had also claimed the relief of possession in the plaint and the issue with regard to possession is common to the parties including the third parties, and therefore, the same can be settled in the suit itself. It was further submitted on behalf of the third parties that to avoid the multiplicity of the suits, it would be appropriate to join them as party defendants. This Court did not accept the aforesaid submission by observing that merely in order to find out who is in possession of the contracted property, a third party or a stranger to the contract cannot be added in a suit for specific performance of the contract to sell because they are not necessary parties as there was no semblance of right to some relief against the party to the contract. It is further observed and held that in a suit for specific performance of the contract to sell the lis between the vendor and the persons in whose favour agreement to sell is executed shall only be gone into and it is also not open to the Court to decide whether any other parties have acquired any title and possession of the contracted property. It is further observed and held by this Court in the aforesaid decision that if the plaintiff who has filed a suit for specific performance of the contract to sell, even after receiving the notice of claim of title and possession by other persons (not parties to the suit and even not parties to the agreement to sell for which a decree for specific performance is sought) does not want to join them in the pending suit, it is always done at the risk of the plaintiff because he cannot be forced to join the third parties as partydefendants in such suit. The aforesaid observations are made by this Court considering the principle that plaintiff is the dominus litis and cannot be forced to add parties against whom he does not want to fight unless there is a compulsion of the rule of law. Therefore, considering the decision of this Court in the case of Kasturi (supra), the appellant cannot be impleaded as a defendant in the suit filed by the original plaintiffs for specific performance of the contract between the original plaintiffs and original defendant no.1 and in a suit for specific performance of the contract to which the appellant is not a party and that too against the wish of the plaintiffs. The plaintiffs cannot be forced to add party against whom he does not want to fight. If he does so, in that case, it will be at the risk of the plaintiffs.

6. Now so far as the reliance placed upon the decision of this Court in the case of Robin Ramjibhai Patel (AIR 2016 SC (Supp.) 733) (supra) and the decision of the Bombay High Court in the case of Shri Swastik Developers (supra), relied upon by the learned Senior Advocate for the appellant is concerned, the aforesaid decisions shall not be applicable to the facts of the case on hand as in both the aforesaid cases, it was the plaintiff who

submitted an application to implead the third parties/subsequent purchasers who claimed title under the vendor of the plaintiff. Position will be different when the plaintiff submits an application to implead the subsequent purchaser as a party and when the plaintiff opposes such an application for impleadment. This is the distinguishing feature in the aforesaid two decisions and in the decision of this Court in the case of Kasturi(supra)."

It shall also be apposite to refer to decision of Hon'ble Apex Court in ***R. Dhanasundari*** vs. ***A.N. Umakanth & ors., 2019(4) Scale 161***, wherein it was observed that object of Order 1 Rule 10 CPC is essentially to bring on record all the persons who are parties to the dispute relating to the subject matter of the suit so that the dispute may be determined in their presence and the multiplicity of proceeding should be avoided. Extracts from the judgment are as under:-

"*11. The present one is clearly a case answering to all the basics for applicability of Rule 1-A of Order XXIII read with Rule 10 of Order I CPC. As noticed, the principal cause in the suit is challenge to the sale deed executed by defendant No. 1 in favour of defendant No. 2, with the original plaintiff asserting his ownership over the property in question. After the demise of original plaintiff, his sons and daughters came to be joined as plaintiff Nos. 2 to 8 with plaintiff No. 5 being the power of attorney holder of all the plaintiffs. After the suit was decreed ex parte, the plaintiff No. 5 transferred the property in question to the aforesaid three purchasers, who were joined as plaintiff Nos. 9 to 11 when the ex parte decree was set aside and suit was restored for bi parte hearing. In the given status of parties, even if the plaintiff Nos. 5 and 9 to 11 were later on transposed as defendant Nos. 3 to 6, the suit remained essentially against the defendant Nos. 1 and 2, that is, in challenge to the sale deed dated 23.03.1985, as executed by the defendant No. 1 in favour of the defendant No. 2. In regard to this cause, even if plaintiff Nos. 5 and 9 to 11 came to be transposed as defendant Nos. 3 to 6, their claim against defendant Nos. 1 and 2 did not come to an end; rather, the interest of the existing plaintiffs as also the defendant Nos. 3 to 6 had been one and the same as against the defendant Nos. 1 and 2.*

12. In the given status of parties and the subject matter of the suit, when the plaintiffs entered into an arrangement with defendant Nos. 1 and 2 and sought permission to withdraw under Order XXIII Rule 1 CPC, the right of defendant Nos. 3 to 6 to continue with the litigation on their claim against defendant Nos. 1 and 2 immediately sprang up and they were, obviously, entitled to seek transposition as plaintiffs under Order XXIII Rule 1-A CPC.

13. It is also noteworthy that even if some question is sought to be raised as regards the rights of the subsequent purchasers (defendant Nos. 4 to 6), the right of the defendant No. 3 (earlier the plaintiff No. 5) to prosecute the

suit as a plaintiff remains rather indisputable in view of his status as one of the legal representatives of the original plaintiff. The right of the said defendant No. 3 (earlier the plaintiff No. 5) to challenge the sale deed between defendant No. 1 and defendant No. 2 did not get annulled only by his earlier transposition as the defendant; and he cannot be considered bound by the arrangement between the existing plaintiffs and the defendant Nos. 1 and 2. In the given set of circumstances, the Trial Court had been justified in allowing the prayer for transposition and the High Court has rightly declined to interfere."

In **AIR 2004 SC 2006**, titled **Kiran Tandon** Vs. **Allahabad Development Authority**,Hon'ble Apex Court reiterated the principle laid down by the Privy Council in **Bhupendra Narayan Sinha** Vs. **Rajeshwar Prasad AIR 1931 PC 162** that for effective and complete adjudication and settling all the questions involved in the civil suit, the Court has power under sub-rule (2) Order 1, Rule 10 C.P.C. to transfer a defendant to the category of plaintiffs and where the plaintiff agrees, such transportation should be readily made. This power could be exercised by the High Court in appeal, if necessary, suo-motu to do complete justice between the parties.

Instant was a civil suit for possession. Claim of proforma defendant of having purchased parts of suit land during pendency of litigation is not disputed by the plaintiffs. On this basis, prayer of proforma defendant to join as co-plaintiff is not opposed by the original plaintiff-the lessee. Due to subsequent events, proforma defendant No. 7 had started sailing in the plaintiffs' boat and had acquired interests common to the plaintiff. It was then a logical corollary to transpose the proforma defendant as a co-plaintiff. Refusal to do so would cause him prejudice. By such transposition, nature and scope of civil suit was not being changed or enlarged. Claim of proforma defendant was not inconsistent with that of original plaintiff, who had *dominus litis*. The issues relating to lease deed pertain to merits of main case and can be adjudicated there. There is thus no error in the impugned order passed by the learned trial Court transposing proforma defendant No. 7 as co-plaintiff. Present petition, therefore, is dismissed being devoid of merit. Pending application(s), if any, shall also stand disposed of.

Parties through their learned counsel are directed to remain present before the learned trial Court on 23.12.2020.

Registry is directed to return the record to the trial Court forthwith.

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

Anand Swarup ....Petitioner

Versus

State of Himachal Pradesh and others ..Respodents

CWPOA No.24 of 2019
Decided on: 02.11.2020

Constitution of India, 1950:- Article 226- Petitioner applied for the post of Drawing Master in respondent department- Appointment offered to private respondent which is assailed – Held, that petitioner and private respondent passed Diploma course from recognized institutes in the same year i.e 2007- Hence, stand of respondent State that private respondent was offered appointment as certificate of vocational course issued to her was earlier in point of time as compared to petitioner not sustainable- Petition disposed of with a direction to concerned Authorities to revisit the respective merit of the Petitioner and private respondent on the strength of documents submitted and appointment be offered to one who is more meritorious. (Paras 14, 17, 18).

For the petitioner: Mr. Tijender Singh, Advocate.

For the respondents: Mr. Dinesh Thakur, Additional Advocate General, with Ms. Divya Sood, Deputy Advocate General, for respondents No.1 and 2-State.

Mr. K.S. Thakur and Mr. Harjeet Singh Advocates, for respondent No.3.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(oral)*

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

7. *"In view of submissions made hereto before, it is therefore respectfully prayed that appropriate order or directions may kindly be issued for the following reliefs:-*

(i) Impugned selection of private respondent vide Annexure A-7 and her appointment as such to the post of Drawing Master (OBC) may kindly be quashed and set aside.

(ii) For directions to the respondents to consider the applicant for selection to the said post of Drawing Master (OBC) and appoint him as such within time bound schedule alongwith all consequential benefits.

(iii) For directing the respondents to produce the records of the case.

(iv) Any other order which this Hon'ble Court deems

just and proper in the facts and circumstances of the case, not limiting to the reliefs prayed hereinabove, may also be granted in favour of the applicant."

2. The case of the petitioner is that he is Graduate in Arts Stream and a holder of two years' Diploma Course in Art and Craft. He did the Diploma Course from Shiwalik VTC, Chowki Maniyar, Bangana, District Una, H.P., and certificate to this effect was issued in his favour by the State Council for Vocational Training, on 29.08.2007. He also attended Combined Annual Training Course of NCC from 17.03.1997 to 28.03.1997 and he further holds Certificate "A" Examination in NCC.

3. Respondent-Department of Elementary Education commenced process for filing up the vacancies for the posts of C&V (Language Teachers and Drawing Masters) in the month of July 2017. The petitioner being eligible, was also considered for appointment against said post. Result of the process undertaken for appointment of Drawing Masters, which was obtained by him, under the Right to Information Act, demonstrated that despite the fact that he had passed the concerned Diploma in the year, 2007, as was by the private respondent, yet appointment stood offered to the private respondent, ignoring the fact that as the petitioner was elder in age to the private respondent, therefore, he should have been offered appointment, in terms of established practice that when two candidates had passed the course in the same year, person elder in age was to be considered for selection. It is on these bases that the appointment of the private respondent has been assailed by the petitioner. It is further the contention of the petitioner that appointment of the private respondent is bad, also for the reason that the selected candidate did not possess any experience.

4. Reply to the petition has been filed by respondents No.1 and 2, as also by the private respondent. The stand of respondents No.1 and 2 is that in terms of information received from the Deputy Director of Elementary Education, Shimla, in the case of batch-wise appointment, date of issuance of original certificate of Diploma Course is the criteria for reckoning the batch of the candidate. According to them, the petitioner had passed two years' Diploma Course of Art and Craft from State Council for Vocational Training, in the year, 2007, and the date of issuance of original certificate was 29.08.2007. Selected candidate, i.e., private respondent had also passed the two years' Diploma Course of Art and

Craft from State Council for Vocational Training, in the Session, 2005-2007, however, the date of issuance of original certificate in her favour was 28th August, 2007. On these bases, said respondents submit that appointment/ selection ofprivate respondent as Drawing Master on batch-wise basis was rightly made by the Appointing Authority as the date of issuance of original certificate of the private respondentpreceded the date on which the said certificate was issued infavour of the petitioner. Rejoinder to the said reply stands filed by the petitioner, wherein, it stands mentioned that justification being given by respondents No.1 and 2, is erroneous, because as both the candidates had obtained the Diploma in the same year, then in terms of the established practice, it was the age of the candidate concerned, which had to be taken into consideration and petitioner being elderin age, ought to have been selected.

5. In the reply filed to the petition by the privaterespondent, the stand, inter alia, taken is that even if overall merit of the parties, was taken into consideration, then alsothe private respondent was more meritorious than the petitioner and though the petitioner happened to be elder in age, as compared to the private respondent, but on merit, in terms of the marks secured by the private respondent in various examinations passed by her, she was more meritorious than the petitioner, therefore, she was rightly offered appointment over and above the petitioner.

6. In terms of order passed by this Court, dated 28.08.2020, an affidavit has also been filed by Director of Elementary Education, Himachal Pradesh, dated 7th September, 2020, alongwith which the criteria which was adopted by the Authorities concerned, while assessing the regular merit of the candidates, stands appended alongwith comparison of merit of the petitioner as well as the private respondent.

7. In the course of his arguments, learned Additional Advocate General has relied upon the judgment of the Hon'ble Full Bench of this Court in ***LPA No.143 of 2013, tilted as Stateof Himachal Pradesh and others Versus Harbans Lal and others,*** decided on September 21, 2013, in justifying the act ofrespondents No.1 and 2.

8. I have heard learned counsel for the parties and have also gone through the pleadings as well documentsappended therewith.

9. In my considered view, there is a strange irony in this

case, wherein, the grounds on which the writ petition was filed by the petitioner, are as erroneous as is the stand taken by the State, in justifying its act of offering appointment to the private respondent over and above the petitioner.

10. This observation is being made by the Court for the following reasons. It is not in dispute that the petitioner as well as the private respondent, joined the Diploma Course in Art and Craft, which was of two years' duration in the year, 2005. It is further not in dispute that both the Institutions in which the petitioner as well as private respondent, respectively, gained admission in the Diploma Course, were affiliated to State Council for Vocational Training, Himachal Pradesh. It is further not in dispute that common examination of Diploma Course conducted by the State Council for Vocational Training, was undertaken by the petitioner as well as the private respondent and on the strength of their respective merit, detail mark sheets, both in favour of the petitioner as well as the private respondent, were issued to them, respectively by the State Council for Vocational Training.

11. Whereas, in the case of the petitioner, the certificate for Vocational Couse was issued on 29.07.2007, in the case of private respondent, it was issued on 28.07.2007. In other words, the vocational course certificate was prepared one-day prior in the case of the private respondent as compared to the petitioner.

12. Now, the moot issue which the Court has to determine is whether the act of respondents-State of offering appointment to the private respondent on the ground that said respondent had a right of consideration for appointment before the petitioner, as the vocational course certificate stood issued to her prior in time than the petitioner, is sustainable in the eyes of law or not, and whether challenge to the appointment so made by respondents No.1 and 2, by the petitioner on the ground that the appointment should have been offered to him, because he was elder in age as compared to the private respondent, is sustainable in law or not.

13. I will first refer to the contention, which has been raised by the petitioner that he should have been offered appointment over and above the private respondent on account of age factor. In my considered view, there is a fallacy in the said contention of the petitioner for the reason that it is settled law

that age is taken into consideration for the purpose of offering appointment inter-se two candidates ifboth candidates are found equal in all terms including merit. Meaning thereby that if the inter-se merit of the candidates is same, then, in such eventuality, age of the candidates comes into play and the candidate who is elder is generally offered appointment. Here the documents whichare on record, demonstrate that merit of the petitioner andthe private respondent, admittedly, is not on the same footing. Therefore, plea of the petitioner that appointment of the private respondent is bad in law, as he being elder in age, ought to have been offered appointment over and above the private respondent, cannot be accepted and is rejected.

14. Now, I will discuss the stand taken by the respondents-State. The stand of the State is that it offered appointment to the private respondent, as the certificate of the vocational course, issued to the private respondent, was earlier in time as compared to the petitioner, therefore, the private respondent had a right of consideration for appointment before the petitioner on the basis of date of issuance of original certificate. In my considered view, the stand so taken by the State is also not sustainable in the eyesof law and the same is completely arbitrary. This, I say so for the following reasons. The petitioner and the private respondent joined the concerned Diploma Course in the sameyear and passed the same, in the same year. To make it moreclear, both the petitioner and private respondent joined the Course in the year, 2005, and as the Course was of two years' duration, they passed the same in the year, 2007. It is not in dispute that both the candidates participated in the examination process, which was held by State Council for Vocational Training, Himachal Pradesh, in the year, 2007. Now, thereafter, what has happened is that, but obvious because hundreds of candidates appeared in the said Diplomaexamination, the issuance of the detail mark sheet in favour ofthe candidates, was a cumbersome process and the same could not have been completed in one day. Therefore, certificates stood prepared on different dates. For example, in the case of the petitioner, certificate was prepared on 29.07.2007, whereas in case of the private respondent, the same was prepared a day before, i.e., 28.07.2007. In these circumstances, when both the candidates had joined the batchin the same year and had passed the batch in the same year, then respective right of the candidates for appointment on batch-wise basis, cannot be made dependent upon a clerical act, i.e., preparation of the detail mark sheet, as has been done in this case by the State. This is completely

fallacious. in a situation, where two candidates pass a course in the same year by participating in the same examination, then prudence and common sense demands that their eligibility and right of consideration has to be assessed on the marks scored by them in the examination, coupled with any other eligibility criteria and not on the fortuitous event of the date of preparation of the mark sheets. Therefore, the stand of the State is also not sustainable in law.

15. In the judgment which has been relied upon by the learned Additional Advocate General, following was the question, which was before the Hon'ble Full Bench for its consideration:-

> *"The question as to whether the date of commencement of the academic year (session) or passing of its prescribed examination would be the relevant date for construing theexpression "batchwise, as stipulated in various Rules, guidelines and instructions issued by the State of Himachal Pradesh, prescribing the eligibility criteria for appointment/ promotion to posts reserved in various Departments of the State of Himachal Pradesh, is urged for consideration before us."*

16. The following is the answer which was given to thesaid question by the Hon'ble Full Bench:-

> *"22. The concept of session-wise/batchwise selection*
>
> *was evolved and introduced by the State to give appointment by way of direct recruitment to candidates who fulfilled the prescribed essential educational qualifications/ criteria, in relation to the examination cleared for the yearin which the batch stood admitted. There may be a candidate who may have taken admission in a particular academic session, but may not have cleared the prescribed examination for acquisition of mandatory educational qualification within the stipulated period of time. Such candidate cannot be considered in the batch of the academic session in which he is admitted. The intention of the Rule makers is evidently clear from the instructions imparted to the learned Advocate General of Himachal Pradesh by the Principal Secretary (Education) to the Government of Himachal Pradesh, that the "date ofissuance of original professional certificate recorded on the detail marks card of final professional examination of the candidate by the concerned University, shall be deemed date for reckoning the batch seniority of the candidate. If more than one candidate is issued the final professional examination*

certificate on the same date, then inter-se-merit would be determined on the basis of academic record of the candidate, knowledge of customs/manners as well as Viva voce". This clarification does not supplant the Rules but only supplements their intention and application, which we find is consistent with the law laid down by the apex Court considered by us (supra).

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 the Constitutional mandate of Article

14. Doctrine of past practice is squarely applicable in the instant case. The practice adopted by the State over a continuous period of time, now stands accepted and codified with the enactment of the "PET 2010 Rules", which we find to be in consonance with the Constitutional principles considered (supra). The Legislative and the Executive intent is thus crystal clear. Where Rules are clear and explicit, the same have to be given effect to. We find that there is no ambiguity at all either in the Rules or the stand taken by the State, reflecting the practice adopted over a continuous period of time."

17. In my considered view, the issue as stands settled by the Hon'ble Full Bench and rightly so is that a candidate belonging to a particular batch, who passes the examination considerably late, cannot say that the date of his passing of examination has to be relegated back to the batch to which he belongs and the same, has to be treated in sync with the date on which he passes the final examination. However, this issue or this controversy has no relevance as

far as this writ petitionis concerned, because there is no dispute with regard to the respective batches of the parties concerned herein.

18. At this stage, it is also relevant to take note of thestand, which has been taken by the private respondent that on merit, she was better placed than the petitioner, therefore also, there is no illegality in offering appointment to the private respondent over and above the petitioner. In this regard, all that this Court can observe in the peculiar facts of the case, especially in view of the stand which stood taken bythe petitioner in assailing appointment of the private respondent and the stand which was taken by respondents No.1 and 2-State in justifying their act, is that as this Court has come to the conclusion that the ground on which the State has defended the appointment of the private respondent, is not sustainable in the eyes of law, therefore, this petition is disposed of with direction to the Authorities concerned to revisit the respective merit of the petitioner as well as the private respondent on the strength of the documents which were with the Authorities concerned at the time when their respective candidature was considered. This shall be done in consonance with the criteria which theAuthorities had adopted at the relevant time, when the appointments were made. In case, after undertaking thisprocess, the Authorities come to the conclusion that the petitioner is more meritorious than the private respondent, then the services of the private respondent shall be terminated and appointment shall be offered to the petitioner. However, in case, the Authorities come to conclusion that the private respondent is more meritorious to the petitioner, thenher services will be continued. Necessary evaluation shall be done by the Authorities concerned, positively, on or before 31st December, 2020. Till same is done, the private respondent shall continue to discharge her duties. It is clarified that as far as the respective merit of the parties is concerned, this Court has not made any observation qua the same. Pending miscellaneous application(s), if any, also stand disposed of.

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

Rahul Verma ..... Petitioner

Versus

Himachal Pradesh Board of School Education and others

.....Respondents

CWPOA No. 136 of 2019
Reserved on : 18.9.2020
Date of Decision: 23.09.2020

Constitution of India, 1950- Article 226- Petitioner and respondent No.2 applied for the post of Computer Hardware Engineer in respondent department- Petitioner has challenged the selection of respondent No.2 on the ground of insufficient experience- Held, that there is condition precedent in notification dated 21.7.2016 to possess five years experience in computer manufacturing/ maintenance- Recruiting Agency was within its power to relax the condition of age and experience as per R & P Rules which are applicable- Error to quote rules in advertisement can not override the rules- Selection of respondent No.2 being more meritorious and relaxation in her favour not being challenged- No legal basis to quash her appointment – Petition dismissed. (paras 20, 26 & 30).

Cases referred:
Ranajit Kumar Meher versus State of Orissa and others, (2017) 4 SCC 568;
Raminder Singh versus State of Punjab and another, (2016) 16 SCC 95;
Indian Institute of Technology and another versus Paras Nath Tiwari and others, (2006)9 SCC 670;
Malik Mazhar Sultan and another versus U.P. Public Service Commission and others, (2006) 9 SCC 507;

For the Petitioner: Mr. Kunal Verma, Advocate, through video conferencing.

For the Respondents: Mr. Diwakar Dev Sharma, Advocate, for respondent No.1, through video Conferencing.

Mr. Dilip Sharma, Senior Advocate with Mr. Manish Sharma, Advocate, for respondent No.2, through video-conferencing

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Pursuant to Notification/ Advertisement dated 21.7.2016 (Annexure A-3), issued by respondent No.1, petitioner as well as respondent No.2 applied for the post of Computer Hardware Engineer in respondent-department (respondent No.1). Perusal of notification/advertisement dated 21.7.2016 (Annexure A-3) reveals that persons possessing following qualifications could apply for the post in question:-

"Essential qualification

(1) Should have passed 10+2 examination or its equivalent from a recognized Board/ University.

(2) B.E./B.Tech in Electronic & telecommunication/I.T. from a recognized University with at least 5 years experience in computer Manufacturing/Maintenance Company or repute.

(3) Preference will be given to candidate with M.Tech in Electronic Degree.

Desirable Qualification

> Knowledge of customs, manner and dialects of Himachal Pradesh and suitability for appointment in the peculiar conditions prevailing in the Pradesh."

2. Record reveals that the petitioner and respondent No.2 having possessed B.Tech in Electronic and M.Tech in Electronic, respectively, from the recognized University applied for the post in question, but fact remains that respondent No.2 came to be selected against the post in question, as is evident from notification (Annexure A-3) on contract basis and since then she has been continuously rendering her services. During the proceedings of the case, it has been informed that respondent No.2 now otherwise stands regularized in the respondent-department in term of regularization policy framed by the State of Himachal Pradesh.

3. Being aggrieved and dissatisfied with the selection of respondent No.2, petitioner approached the erstwhile H.P. Administrative Tribunal by way of Original Application No.1561 of 2017, which now stands transferred to this Court and re-registered as CWPOA No.136 of 2019, praying therein following reliefs:-

(i) That the impugned selection and appointment of respondent No.2 may be held illegal and quashed and set aside.

(ii) That the decision of the respondent No.1 to show the respondent No.3 in the waiting list at Sr. No.2 may also be held illegal and quashed.

(iii) That the applicant being possessing the essential qualification and illegally ignored by the respondent No.1 by selecting respondent No.1 and showing the respondent No.2 in the waiting list, may be ordered to be appointed as Computer Hardware Engineer with all consequential benefits.

4. Precise case of the petitioner is that since respondent No.2 did not possess requisite qualification, she could not have been given preference over him being M.Tech in Electronic/ I.T., especially when she did not have any experience in Computer Manufacturing/ Maintenance from the Company of repute.

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

6. Question which falls for consideration/adjudication in the present proceedings before this Court is that "whether respondent No.2 being M.Tech in electronic/I.T., could have been given preference over the petitioner despite her having no experience in Computer Manufacturing/ Maintenance from the Company of repute" and "whether respondent-department had any power to relax the condition of the experience while selecting respondent No.2 against the post in question. Before exploring answer to the aforesaid questions, it is

relevant to mention here that case at hand was earlier heard on 24.8.2020 by this Court when none appeared on behalf of respondent No.2 and as such, this Court on the basis of the material available on record quashed and set-aside the selection of respondent No.2 with further direction to the respondent-Board to engage the petitioner against the post in question being next in line. However, immediately after passing of aforesaid judgment, learned counsel representing respondent No.2 informed this Court that since his name did not figure in the cause list, he was unable to put in appearance and as such, he filed Review Petition, which came to be registered as Review Petition No.33 of 2020. Vide order dated 4.9.2020, this Court having taken note of the fact that name of Mr. Manish Sharma, Advocate did not figure in the cause list at the time of passing the judgment dated 24.8.2020, recalled the judgment dated 24.8.2020 and listed the matter for fresh hearing.

7. After passing of order dated 4.9.2020 in the review petition, matter came to be adjourned on three dates on the request of learned counsel representing the parties and during this period respondent No.2 filed his reply.

8. Today, before proceeding to hear the matter on merit afresh, this Court specifically enquired from the learned counsel representing the petitioner whether he wants to file any rejoinder to the reply filed by respondent No.2, but since learned counsel representing the petitioner specifically stated that no rejoinder is intended to be filed, matter came to be heard and decided finally vide judgment at hand.

9. Mr. Diwakar Dev Sharma, learned counsel representing respondent No.1, contended that since respondent No.2 possessed degree of M.Tech in Electronic, she was given preference over the petitioner, who apart from having Bachelor's degree have/had five years experience in Computer Manufacturing/ maintenance from the company of repute.

10. Having perused the essential qualification, as prescribed in the notification dated 21.7.2016 (Annexure A-3), this Court has no hesitation to conclude that candidate aspiring for the post of Computer Hardware Engineer on contract basis besides having B. Tech or M. Tech Degree in Electronic/I.T. ought to have possessed five years experience in Computer manufacturing/maintenance from a company of repute and as such if selection of respondent No.2 is tested on the touch stone of aforesaid condition, there appears to be force in the submission made by learned counsel for the petitioner that respondent-Board ought not have given preference to respondent No.2 over the petitioner merely on the basis of her higher education i.e .M.Tech in electronic. Essential qualification, as has been prescribed in the notification/advertisement dated 21.7.2016, nowhere suggests that person aspiring for the post in question should possess one of the qualification as provided under the column of essential qualification, rather he/she apart from having degree in B.Tech/ M.Tech in electronic should

also possess experience of five years in Computer manufacturing/maintenance from a company of repute. Question of preference, if any, in terms of Clause-3 of essential qualification would arise when candidate claiming such preference was able to show that he/she is eligible to be considered for the post in question. Before claiming preference in terms of Clause-3, as provided in the column of essential qualification, candidate concerned is/was required to establish on record that he/she besides having B.Tech or M.Tech in electronic and I.T. from the recognized University, also possesses five years experience in Computer manufacturing/ maintenance from a company of repute. Had both the petitioner and respondent No.2 possessed equal qualification i.e. B.Tech/M.Tech with requisite experience, respondent No.2 could have been given preference over the petitioner being M.Tech in terms of Clause-3 of essential qualification.

11. However, in the case at hand, reply filed by respondent No.2 reveals that she was not given preference on account of her higher education i.e. M.Tech in electronic, rather selection Board/ Interview Board having found her more meritorious selected her against the post in question. Mr. Dilip Sharma, learned Senior Counsel representing respondent No.2 while inviting attention of this Court to the Recruitment and Promotion Rules (for short R &P Rules) for the post of Computer Hardware Engineer in the Himachal Pradesh Board of School Education Dharamshala, contended that condition of age and experience in the case of direct recruitment is relaxable at the discretion of recruitment agency in case the candidate is well qualified. At this stage, it would be profitable to reproduce R& P Rules for the of the post of Computer Hardware Engineer herein:-

RECURITMENT AND PROMOTION RULES FOR THE POST OF COMPUTER HARDWARE ENGINEER IN THE HIMACHAL PRADESH BOARD OF SCHOOL EDUCAITON DHARAMSHALA.

(As per the Recruitment and promotion Rules, 2010 of Indira Gandhi National Open University and adopted in the Board meeting held on 18.07.2016 under item No.32)

1.	Name of Post	Computer Hardware Engineer
2.	Number of Posts	01 or as determined by the Board from time to time.
3.	Classification	Class-1
4.	Scale of Pay	₹15600-39100 +5400 (Emoluments for contract employees ₹2100 P.M) (as per details given in Column 15-A)
5.	Whether Selection Post or Non-selection	Selection
6.	Age for direction recruitment	Between 45 years and below.

Provided that the upper age limit for direction recruits will not be applicable to the candidates already in service of the Government/Board including those who have been appointed on adhoc or contract basis;

Provided further that if a candidate appointed on adhoc basis or contract basis had become over-age on the date he/she was appointed as such he/she shall not be eligible for any relaxation in the prescribed age limit by virtue of his/her such adhoc or contract appointment;

Provided further that upper age-limit is relaxable for Scheduled Caste/Scheduled Tribes/ Other categories of persons to be extent permissible under the general special order(s) of the Himachal Pradesh Government.

Provided further that the employee of all the Public Sector Corporation and Autonomous Bodies who happened to be Government Servants before absorption in Public Sector Corporation/ Autonomous Bodies at the time of initial constitution of such Corporation/ Autonomous Bodies shall be allowed age concession in direct recruitment as admissible to Government servants. This concession will not, however, be admissible to such staff of the Public Sector Corporation. Autonomous Bodies and who were/are finally absorbed in the service of such Corporation/ Autonomous Bodies after initial constitution of the Public Sector Corporation/ Autonomous Bodies.

(1) Age limit for direct recruitment will be reckoned on the first day of the year in which the post(s) is/are advertised for inviting application or notified to the employment Exchanges or as the case may be.

(2) Age and experience in the case of direct recruitment, relaxable at the discretion of the Recruitment Agency as the case may be, in case the candidate is otherwise well qualified.

7.	Minimum educational and other qualifications required for direct recruit(s).	a) **Essentia**l: (i) B.E./B.Tech. Degree in Electronics & Telecommunication/ IT from a recognized University with at least 5 years experience in computer manufacturing/ maintenance company of repute. (ii) Preference will be given to candidates with M.Tech. in Electronic Degree. **b) DESIREABLE QUALIFICATION** Knowledge of customs, manners and dialects of Himachal Pradesh and Suitability for appointment in the peculiar conditions prevailing in the Pradesh.
8.	Whether age and Educational qualification(s) prescribed for	

	direct recruit(s) will apply in the case of promotes.	Not applicable.
9.	Period of Probation if any	Two years subject to such further extension for a period not exceeding one year as may be ordered by the competent authority in special circumstances and reasons to be recorded in writing.
10.	Method of recruitment, whether by direct recruitment or by promotion, deputation/ transfer and the percentage of vacancies to be filled in by various methods.	100% by Direct Recruitment on contact basis. Every members of the service on contract basis be eligible for regularization as per policy of Government of Himachal Pradesh for regularization of contract employees, of course, subject to condition that his past record is found satisfactory and his initial appointment is in accordance with these Rules.
11.	In case of recruitment by promotion, deputation/ transfer, grades from which promotion/ deputation/transfer is to be made.	Not applicable.
12.	If a Departmental Promotion Committee exists, what is its composition?	Not applicable.
13.	Circumstances under which the HPPSC is to be consulted in making recruitment.	As required under the Law.
14.	Essential requirement for a direct recruitment.	A candidate for appointment to any service or post must be a citizen of India.
15.	Selection for appointment to the post by direct requirement on contract basis.	Notwithstanding anything contained in these Rules contract appointments to the post will be made subject to the terms and conditions given below;-

(i) **CONCEPT:**

(a) Under this policy the Computer Hardware Engineer in the office of HP Board of School Education will be engaged on contract basis initially for one year which may extendable for two more years on year to year basis.

(b) Provided that for extension /renewal of contract period on year to year basis, the Appointing Authority shall issue a certificate that the services and conduct of the contract

appointee is satisfactory during the year and only then his period of contract is to be renewed/extended.

(c) The Candidate will be selected by advertising the vacant posts by the Recruitment Agency decided by the Board.

(d) The selection will be made in accordance with the eligibility condition prescribed in these rules.

(ii) CONTRCTUAL EMOLUMENTS:

The Computer Hardware Engineer appointed on contract basis will be paid consolidated fixed contractual amount `21000/- per month (which shall be equal to initial of the pay scale+ Grade pay). A amount of `630/-(3% of minimum of the pay Band+ Grade Pay of the post) as annual increase in contractual emoluments for subsequent year(s) will be allowed if contract is extended beyond one year.

(iii) APPOINTING/DISCIPLINARY AUTHORITY

The Chairman of the Board will be the appointing and Disciplinary Authority.

(iv) SELECTION PROCESS

The Board will send the requisition to the concerned Recruiting Agency as decided by the Board.

(v) COMMITTEE FOR SELECTION OF CONTRACTUAL APOINTMENTS

As may be constituted by the concerned recruiting agency as decided by the Board.

(vi) AGREEMENT

After selection of candidate he/she shall sign an agreement as per Annexure –"B" appended to these rules.

(vii) TERMS AND CONDITIONS

a) The contractual appointee will be paid fixed contractual amount `21000/- per month (which shall be equal to initial of the pay Scale +Grade Pay). The contract appointee will be entitled for increase in contractual amount of `630/-(3% of minimum of the pay Band+ Grade Pay of the post) for further extended years and no other benefits such as Senior/selection scales etc. will be given.

b) The services of the Contract Appointee will purely and temporary basis. The appointment is liable to be terminated in case the performance/conduct of the contract appointee is not found satisfactory.

c) Contract appointee will be entitled for one day causal leave after putting one month service. However, the contract employee will also be entitled for 135 days Maternity Leave and

10 day's Medical Leave and five days special leave. He/she shall not be entitled for Medical Re-imbursement and LTC etc. No leave of any other kind except above is admissible to the Contract appointee.

Provided that the un-availed Casual Leave, Medical Leave and Special Leave can be accumulated up to Calendar year and will not be carried forward for the next calendar year.

d) Unauthorized absence from the duty without the approval of the controlling Officer shall automatically lead to the termination of the contract. However, in exceptional cases where the circumstances for unauthorized absence from duty were beyond his/her control on medical grounds, such period shall not be excluded while considering his/her case for regularization but the incumbent shall have to intimate the controlling authority in this regard well in time. However, the contract appointee shall not be entitled for contractual amount for this period of absence from duty.

Provided that he/she shall submit the certificate of illness/fitness issued by Medical Officer as per prevailing instructions of the Government.

e) An official appointed on contract basis who has completed three years tenure at once place of posting will be eligible for transfer on need based basis wherever recruited on administrative grounds.

f) Selected candidate will have to submit a certificate of his/her fitness from Government Hospital issued by the Chief Medical Officer or other competent authority. In case of Women candidate, pregnancy beyond 12 weeks will render her temporarily unfit till the confinement is over. The women candidate prior to her joining should be re-examined for the fitness from an authorized Medical Officer/other competent authority.

g) Contract appointee will be entitled to TA/DA if required to go on tour in connection with his/her official duties at the same rate as applicable to regular counter- part officials at the minimum of the pay scale.

h) Provisions of service rules like FR, SR, Leave Rules, GPF Rules, Pension & Conduct rules etc, as are applicable in case of regular employees will not be applicable in case of contract appointees. They will be entitled for emoluments etc. as detailed in this Column.

16.	Reservation	The appointment to the service shall be subject to orders regarding reservation in the service for Scheduled Castes/Scheduled Tribes/ Other backward Classes/ other categories of persons issued by the Himachal Pradesh Government from time to time.

17.	Departmental Examination	Not applicable.
18.	Power to Relax	Where the Board is of the opinion that it is necessary or expedient to do so, it may by order for reasons to be recorded in writing relax any of the provisions of these rules with respect to any class of category of persons of post(s).

12. Close scrutiny of aforesaid R& P Rules framed by respondent No.1 for the post of Computer Hardware Engineer clearly reveals that Recruiting Agency is /was well within its power to relax the condition of age and experience of the candidate, who is/was otherwise found to be well qualified. As per R& P Rules for the post in question, Computer Hardware Engineer in the respondent-Department is/was to be engaged on contract basis initially for one year, which is extendable for two years on year to year basis. Otherwise also, Rules, as have been taken note hereinabove, nowhere deals with the regular appointments, rather same appears to have been framed for regulating the services of the candidate appointed on contract basis. Clause -10 of the aforesaid Rules, clearly reveals that post of Computer Hardware Engineer is to be filled up by 100% direct recruitment on contract basis and as such, there is no dispute that Rules, as have been taken note hereinabove, are/were applicable for the post in question.

13. Reply filed by respondent No.1, if read in its entirety, reveals that since it was clearly mentioned in the advertisement dated 21.7.2016 that preference will be given to the higher professional /technical qualifications, respondent No.2 being M. Tech was preferred above the petitioner, who was B.E./B.Tech in telecommunication.

14. Reply filed by respondent No.2 as well as other material available on record clearly reveal that respondent No.2 secured 152 marks in total(124 in written and 28 in interview), whereas petitioner secured 143 marks in total(118 in written and 25 in interview). Both petitioner and respondent No.2 secured 25 and 28 marks respectively, in interview out of 30 marks and even if 5 more marks are awarded to the petitioner in interview, he would not secure more marks than respondent No.2 and as such, there cannot be any dispute that academically respondent No.2 is more meritorious than the petitioner.

15. Though, there is neither any averment in the reply filed by respondent No.1 nor any material is available on record suggestive of the fact that respondent-Board recorded the reasons in writing while relaxing the condition of experience in the case of respondent No.2, but it clearly emerge from the pleadings as well as documents available on record that Committee of

expert constituted by respondent-Board for viva-voce and personal interview having found respondent No.2 more meritorious than other candidates, recommended her for appointment against the post in question.

16. Mr. Kunal Verma, learned counsel representing the petitioner argued that Notification dated 21.7.20016 ***(Annexure A-3***), whereby respondent No.2 came to be appointed against the post of Computer Hardware Engineer, which is on contract basis, nowhere reveals that Interview Board having found her more meritorious or eligible, relaxed the condition of experience and as such, respondent No.2 at this stage cannot be allowed to draw benefit, if, any, of condition of relaxation contained in the R&P Rules.

17. Besides above, Mr. Kunal Verma, learned counsel representing the petitioner contended that otherwise also, there is/was no mention in the advertisement (Annexure A-3) that selection to the post in question would be in terms of R&P Rules and as such, condition, if any, of relaxation in age and experience, as provided under the Rules could not have been made applicable to the selection process initiated by respondent No.1 for the post in question vide advertisement dated 21.7.2016.

18. True, it is that Clause-18 of the R&P Rules, wherein power to relax has been provided to the respondent-Board, suggests that where the Board deems it necessary or expedient to relax any of the provisions of these Rules with respect to any class of category of persons of post(s), it may do so in writing by recording reasons. Mr. Kunal Verma, learned counsel representing the petitioner argued that respondent No.1 in its reply has nowhere revealed that Recruiting Agency recorded reasons in writing while relaxing the condition of experience in favour of respondent No.2 and as such, selection of respondent No.2 cannot be said to be in terms of the R&P Rules.

19. True, it is that there is no mention, if any, in the advertisement that post in question would be filled up in terms of R&P Rules and condition of age and experience can be relaxed in case candidate otherwise is well qualified, but there cannot be any dispute that recruitment to the post in question could only be made in accordance with the Rules and as such, error, if any, in the advertisement cannot override the Rules and create a right in favour of a candidate if otherwise not eligible according to the Rules. The relaxation of age can be granted only if permissible under the Rules and not on the basis of the advertisement. In this regard, reliance is placed upon the judgment rendered by Hon'ble Apex Court **in Malik Mazhar Sultan and another versus U.P. Public Service Commission and others,** (2006) 9 Supreme Court Cases 507, wherein it has been held as under:-

> "21, The present controversy has arisen as the advertisement issued by PSC stated that the candidates who were within the age on 1.7.2001 and 1.7. 2002 shall be treated within age for the examination. Undoubtedly, the excluded

> candidates were of eligible age as per the advertisement but the recruitment to the service can only be made in accordance with the rules and the error, if any, in the advertisement cannot override the Rules and create a right in favour of a candidate if otherwise not eligible according to the Rules. The relaxation of age can be granted only if permissible under the Rules and not on the basis of the advertisement. If the interpretation of the Rules by PSC when it issued the advertisement was erroneous, no right can accrue on basis thereof. Therefore, the answer to the question would turn upon the interpretation of the Rules."

20. By now it is well settled that whatsoever required by law must be read overridingly into every contract of employment. If Rules requires a particular qualification for a person to be employed against the particular post, such a requirement is must be read into the advertisement and to the contact of the employment. Statutory requirement under the Act/ Rules should be overridingly read in the advertisement and as such, even if advertisement did not specify that selection to the post in question would be made in terms of R& P Rules, it would not vitiate the selection process, if any, initiated/made on the basis of the advertisement, rather requirement contained under the Act and Rules must be overridingly read into the advertisement.

21. The Hon'ble Apex Court in **Indian Institute of Technology and another versus Paras Nath Tiwari and others,** (2006)9 Supreme Court Cases 670, has held as under:-

> "11. We have been taken through the Rules in Parts VI, XII-B and XIII-A. These provisions relate to persons who privately own aircraft which are required to be kept in good repair, maintained and kept in good condition. Even such persons working as Maintenance Engineers have to be licensed by DGCA or the other authorities prescribed under the Act and the Rules, for obvious reasons. Whenever an aircraft files, there is danger to the lives of the persons flying in the aircraft as well as to the persons in the vicinity if the aircraft is not properly maintained as a result of which it crashes. Hence, there are stringent requirements under the Aircraft Act read with the Aircraft Rules that the aircraft be maintained at all times in proper condition and certified to be airworthy in accordance with the Rules by the Maintenance Engineers holding licence in accordance with the Rules. That was the reason why the appellant Institute had called upon the first respondent to produce a licence of the requisite type from DGCA. This was exactly what was understood by the first respondent also, as evident from the correspondence between him and the appellant Institute.
>
> 12. Learned counsel for the respondent took up the stand that there was no obligation on the part of the first respondent to produce such a licence. He repeatedly contended that there was no such requirement indicated in the advertisement of the vacancy and, therefore, the respondent was not obliged to produce any such licence. We are unable to accept this contention. In the first place, as rightly contended by Mr. Ganguli, what is required by law must be

> read overridingly into every contract of employment. That the Rules require a licence for a person to be employed as Maintenance Engineer of an aircraft is clear, irrespective of whether the advertisement prescribed it or not. Such a requirement must be read into the advertisement and to the contract of employment. Apart therefrom, the letter of appointment in clear terms states (vide clause 4) that the first respondent was required to produce an AME licence for the requisite type of aircraft owned by the Institute. This was clearly understood by the first respondent, as seen from his correspondence wherein he did not deny such a requirement, but kept asking for time and extension of probation. The contention of the learned counsel for the first respondent is, therefore, without merit and cannot be accepted".

22. Another contention raised by learned counsel representing the petitioner that since respondent No.2 did not possess requisite qualification in terms of the advertisement, her selection deserves to be quashed has also no merit because anything prescribed in the advertisement dehors the Rules is bad in law. Since, as has been discussed hereinabove, selection to the post in question was to be made on the basis of R& P Rules, which though provides five years experience alongwith education qualification, but also empowers Recruiting Agency to relax the condition of experience in the case of the candidate, who is otherwise eligible as such, selection of respondent No.2 cannot be held to be bad on the ground that she did not possess qualification as is/was provided in the advertisement. In this regard, reliance is placed upon the judgment rendered by Hon'ble Apex Court in ***Raminder Singh versus State of Punjab and another***, (2016) 16 Supreme Court Cases 95, wherein it has been held as under:-

> "24. The learned Counsel for the respondents, however, contended that the appellant did not possess the requisite qualifications that were necessary for the promotional post as prescribed in the advertisement and hence cancellation of the appellant's promotion was appropriate. We do not find any force in this contention.
>
> 25. As held supra, the appellant had fulfilled the necessary criteria prescribed in Rule 10. It was, in our view, sufficient compliance for the in-service candidate. Anything prescribed in the advertisement, which was dehors the Rules was bad in law".

23. Reliance is also placed upon the judgment rendered by Hon'ble Apex Court in **Ranajit Kumar Meher versus State of Orissa and others**, (2017) 4 Supreme Court Cases 568, wherein it has been held as under:-

> "1. Leave granted. In the affidavit filed on 15.10.2013 by the Joint Director, Directorate of Animal Husbandry and Veterinary Sciences, Government of Odisha, it is stated that the petitioner does not have the qualification prescribed under the Orissa Non-Gazetted Veterinary Technical Services

> (Recruitment & Conditions of Service) Rules, 1983, as amended in the year 1997. The whole crux of the argument of the learned counsel for the petitioner is that he possesses the qualification as per the advertisement issued on 16.01.2004.
>
> 2. Having heard the learned counsel appearing on both the sides, we are of the view that there cannot be any appointment in violation of the Rules. Qualification is to be seen with respect to the Rules and not the advertisement inviting applications. The appellant, admittedly, does not possess the qualification as prescribed under the Rules".

24. By now it is well settled that advertisement, which is contrary to the Statutory Rules has to give way to the statutory prescription. Though, in the case at hand advertisement in question did not contain/specify that Recruiting Agency has power to relax the condition of experience, but since same is prescribed under the statutory Rules i.e. R& P Rules, selection of respondent No.2 cannot be termed to be bad in law. Whenever there is variance in the advertisement and in the statutory Rules, it is the statutory rules which take precedence.

25. Reliance is placed upon the judgment rendered by Hon'ble Apex Court in **Ashish Kumar versus State of Uttar Pradesh and others,** (2018) 3 Supreme Court Cases 55, wherein it has been held as under:-

> 27. Any part of the advertisement which is contrary to the statutory rules has to give way to the statutory prescription.Thus, looking to the qualification prescribed in the statutory rules, appellant fulfils the qualification and after being selected for the post denying appointment to him is arbitraryand illegal. It is well settled that when there is variance in the advertisement and in the statutory rules, it is statutory rules which take precedence. In this context, reference is made in judgment of this Court in the case of Malik *Mazhar Sultan & Anr. Vs. U.P. Public Service Commission & Ors.*, 2006 (9) SCC 507. Paragraph 21 of the judgment lays down above proposition which is to the following effect:
>
> "21. The present controversy has arisen as the advertisement issued by PSC stated that the candidates who were within the age on 01.07.2001 and 01.07.2002 shall be treated within age for the examination. Undoubtedly, the excluded candidates were of eligible age as per the advertisements but the recruitment to the service can only be made in accordance with the Rules and the error, if any, in the advertisement cannot override the Rules and create a right in favour of a candidate if otherwise not eligible according to the Rules. The relaxation of age can be granted only of permissible under the Rules and not on the basis of the advertisement. If the interpretation of

> the Rules by PSC when it issued the advertisement was erroneous, no right can accrue on basis thereof. Therefore, the answer to the question would turn upon the interpretation of the Rules."

26. Since, this Court while placing reliance upon the various judgments (supra) rendered by Hon'ble Apex Court, has held that qualification prescribed under the statutory Rules take precedence to the qualification, if any, prescribed in the advertisement, no fault, if any, can be found with the action of Recruiting Agency inasmuch as it deemed it fit to grant relaxation of experience in the case of respondent No.2 having found her more meritorious than other candidates including the petitioner.

27. Once, there is no dispute in terms of the provisions contained in the R&P Rules that Recurring Agency could relax the condition of age and experience in case of candidate, who is otherwise found to be suitable, no right can be said to have accrued in favour of the petitioner merely on the ground that Recruiting Agency while relaxing the condition of experience failed to record the reasons in writing.

28. Leaving everything aside, petitioner neither has laid challenge to the aforesaid R&P Rules nor have alleged mala-fides, if any, against the members of the Interview Board, who selected respondent No.2 being more meritorious. Apart from above, decision of the respondent-Board to grant relaxation in favour of respondent No.2 has not been challenged and as such, this court finds no legal basis to quash the appointment of respondent No.2 on the ground that Recruiting Agency while granting relaxation of the condition of experience failed to record the reasons. Since, bona-fides of the decision of the Board to select respondent No.2 by granting relaxation has not been laid challenge, appointment of respondent No.2 cannot be held to be irregular. In this regard, reliance is placed upon the judgment rendered by Hon'ble Apex Court in case titled **Arun Kumar and others versus Himachal Pradesh State Electricity Board and others**, Civil Appeal No.6064 of 2010, decided on 21.3.2017, wherein it has been held as under:-

> "9. We are unable to find any legal basis for the above finding. The fact remains that bona-fides of the decision of the Board to fill up the direct recruit quota for the promotees has not been challenged. Once a decision was taken by the Board to regularize the adhoc promotes against direct quota, there appointment could not be held to be irregular. They were promoted after following due procedure against existing vacancies. There is a specific provision in the Recruitment and Promotion Regulations for relaxation."

29. Reliance is also placed upon the judgment rendered by Hon'ble Apex Court **in Karam Pal and others versus Union of India and others** (1985)2 Supreme Court Cases 457, wherein it has been held as under:

> "13.In Course of the hearing counsel for the petitioners referred to instances where a direct recruit coming into the cadre several years after others coming into the cadre from the Select List had been assigned seniority over such promotees. This was explained by counsel for the respondents to have been the outcome of giving effect to clause (3) of Regulation 3 as it stood prior to December, 1977 without the proviso. The instances relied upon were found to be events prior to the introduction of the proviso. In the absence of challenge to the Rules and the Regulations, resultant situations flowing from compliance- of the same are not open to attack. Occasion for similar grievance would not arise in future as the proviso in the relevant regulation and clauses (4) and (5) of the Regulation 3 will now meet the situation."

30. Otherwise also, plain reading of Clause-18 i.e. power to relax as provided under the R&P Rules suggests that for the reasons to be recorded in writing, Board can exempt any class of category of persons of post(s), as defined in the Recruitment & Promotion Rules from the purview of various Rules by recording reasons in writing, but that does not mean that person, who is otherwise entitled to have relaxation in terms of provisions contained in the Rules cannot claim such relaxation till the time order of relaxation is not passed in that regard by the respondent-Board, rather decision, if any, with regard to relaxation of age and experience can be taken by the Interview /Selection Board constituted by the Recruiting Agency after having seen overall qualification and suitability of the candidate seeking relaxation. Since, R&P Rules itself provides relaxation of age and experience in the case of the candidate, who is otherwise well qualified, no specific reasons, if any, is /are required to be recorded by the Interview/Selection Board while extending the benefit of relaxation of experience in favour of respondent No.2. Otherwise also, Rules providing for relaxation of age and experience as prescribed under the R&P Rules suggests that age and experience in the case of direct recruitment can be relaxed at the discretion of Recruitment Agency, whereas Clause-18, as has been taken note hereinabove, gives power to the Board to relax any of the provisions of R& P Rules with respect to any class of category of persons of post(s) for the reasons to be recorded in writing. Very intention of rule makers to give power of relaxation to Interview/Selection Board responsible for selecting the candidate against the post in question can be gathered from the word used in the Rules i.e. Recruiting Agency", especially when such power is read independent of power vested in Board under Clause-18. Use of word "Recruitment Agency' Clause-2 of R&P Rules itself suggests that decision with regard to relaxation of experience in the case of direct recruitment is to be taken by the Recruitment Agency i.e. body constituted for selection of candidate having taken note of other qualification of the candidate, who is otherwise well qualified. Once, there is /was no Rule requiring Interview Board to record reasons and in the absence of mala-fides attributed against the members of the Board, exemption granted in favour of respondent No.2 without recording reasons cannot be faulted with. Besides above, no mala-

fides, if any, have been alleged against the members of the interview/selection Board, who having found more qualified, relaxed the condition of experience in the case of respondent No.2.

31. Reliance is placed upon the judgment rendered by Hon'ble Apex Court in ***B.C. Mylarappa alias Dr. Chikkamylarappa versus Dr. R. Venkatasubbaiah and others*** (2008) 14 Supreme Court cases 306, wherein it has been held as under:-

> " 29.It is not in dispute that there is no rule or regulation requiring the Board to record reasons. Therefore, in our view, the High Court was not justified in making the observation that from the resolution of the Board selecting the appellant for appointment, no reason was recorded by the Board. In our view, in the absence of any rule or regulation requiring the Board to record reasons and in the absence of mala fides attributed against the members of the Board, the selection made by the Board without recording reasons cannot be faulted with'.

32. Consequently, in view of the above, the present petition is dismissed being devoid of any merit alongwith pending applications, if any.

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

Devinder Singh ....Petitioner.

Versus

State of Himachal Pradesh & others ...Respondent.

CWP No.1958 of 2020
Reserved on 05.10.2020
Decided on: 30.10.2020

Constitution of India, 1950:- Article 226- Inquiry held against petitioner who was serving in Forest Department for dereliction of duties- As per inquiry report Articles of charge not proved- Disciplinary Authority ordered de-novo inquiry which is challenged- Held, that there is no provision in Rule 15 CCS (CCA) Rules 1965 for completely setting aside previous inquiry report except remitting back matter to inquiry Authority- Petition partly allowed and order of Disciplinary Authority for de-novo inquiry set aside with a liberty given to remit matter back to Inquiry Authority for further inquiry. (Paras 15,16,17)

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

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

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

> "(i) Writ in the nature of certiorari may kindly be issued to the respondents to quash order dated 07.01.2020 i.e. Annexure P-6 whereby the respondent No.1 proposed to initiate de-novo enquiry against the petitioner.
> (ii) Writ in the nature of mandamus may kindly be issued to conclude the enquiry proceedings as per the enquiry report submitted to the respondent No.1 i.e. Annexure P-7".

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

Petitioner is serving in the Forest Department of the respondents/State. Vide Annexure P-1, i.e. Memoradum dated 21.08.2014, the petitioner was informed that the department intended to hold an inquiry against him as well as one Shri Gopal Chand, under Rule-14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 and the petitioner was called upon to submit his response to the Article of Charges appended with the Memorandum. Vide Annexure P-2, the petitioner submitted his response to the same. As the Disciplinary Authority was not satisfied with the response so filed by the petitioner, accordingly, an Inquiry Officer was appointed to hold inquiry on the Charges which stood framed against the petitioner. Shri Hardev Singh Negi was appointed as an Inquiry Officer. Probably, feeling aggrieved by the slow speed with which the inquiry proceedings were being dealt with, the petitioner approached this Court by way of CWP No.1990 of 2019, titled as Devinder Singh Versus State of Himachal Pradesh & others, which stood disposed of by this Court vide judgment dated 23.08.2019 in the following terms:-

> "3. It appears that a Charge Memo was issued under Rule 14 of the CCS (CCA) Rules, 1965, against the petitioner on 21.08.2014. The Inquiry Officer was appointed only in December, 2017. According to the petitioner, the inquiry is now completed but no final orders passed.
> 4. There is no justification for not concluding the proceedings and passing the final order, despite a lapse of five years. Even the appointment of Inquiry Officer has taken more than three years. Therefore, the writ petition is disposed of directing the respondents to conclude inquiry and pass a final order within two months from the date of receipt of a copy of this order".

3. After the conclusion of the inquiry, the Inquiry Officer submitted his report and the conclusion reached was that Article of Charge No.1 pertaining to dereliction of mandatory Government duties, i.e. failure to detect large scale of illicit feeling of trees in Patarana Beat thereby causing loss to the tune of Rs.59,43,125/- to the State exchequer as also Article of Charge No.2 that there was connivance of the delinquent officials with the offenders, were not proved and benefit of doubt existed in favour of the charged officials.

4. Upon receipt of the Inquiry Report, the Disciplinary Authority, vide order dated 07.01.2020, feeling dissatisfied with the Inquiry Report, observed on the basis of reasoning assigned therein that the Government was not accepting the Inquiry Report as submitted by the Inquiry Officer and a de-novo inquiry was being proposed to be conducted in the case. Vide same order, the Disciplinary Authority appointed Shri Arvind Kumar, IFS, DFO Rampur as Inquiring Authority to inquire into the charges framed against the petitioner as well as Shri Gopal Chand and vide another order of the even date, Shri Layak Ram Negi, Superintendent Grade-I, Office of CF Rampur was appointed as Presiding Officer to assist the Inquiry Officer. It is in this background that the writ petition has been filed by the petitioner, praying for the reliefs already enumerated hereinabove.

5. Learned Counsel for the petitioner has primarily argued that order dated 07.01.2020 passed by the Disciplinary Authority, vide which the Inquiry Report submitted by the Inquiry Officer has not been accepted and a de-novo inquiry has been ordered by appointing a fresh Inquiry Officer, is not sustainable in the eyes of law as once the Inquiry Officer has submitted his report, then the Disciplinary Authority has to proceed in the matter in terms of the provisions of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, which do not confer any power upon the Disciplinary Authority to order holding of a de-novo inquiry.

6. Learned Counsel for the petitioner has relied upon the following judgment in support of his contention:-

"K.R. Dev Versus *The Collector of Central Excise, Shillong, 1971 (2) Supreme Court Cases 102"*.

7. On the other hand, supporting the act of the Disciplinary Authority, learned Additional Advocate General has argued that there is no infirmity in the act of the Disciplinary Authority of ordering a de-novo inquiry, as the documents appended with the petition were self-speaking as to why de-novo inquiry was necessary in the case, wherein on account of illicit feeling of trees in Patarana Beat, loss to the tune of Rs.59,43,125/- stood caused to the Government Exchequer. Learned Additional Advocate General has argued that the substantial issues involved in the inquiry with regard to two Jeepable roads, which stood constructed through forest land, was conveniently overlooked by the Inquiry Officer as well as the witnesses which created room for further inquiry and further there was no bar to order such inquiry by the Disciplinary Authority by a different Officer as the same was permissible in terms of the provisions of Rule-15 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965.

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

9. In the present case, this Court is deliberately not making any comments on the merits of the case,i.e. the allegations which have been made against the petitioner in the Article of

Charges, for the reason that the moot issue which this Court has to decide is as to whether the act of the Disciplinary Authority of ordering a de-novo inquiry through a new Inquiry Officer is sustainable in the eyes of law or not and this Court is going to answer this limited question only in this writ petition.

10. Rule-14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 deals with the procedure for imposing major penalties. Rule-15 thereof deals with action on the Inquiry Report. This Rule provides that the Disciplinary Authority, if it is not itself the Inquiry Authority, may for reasons to be recorded by it in writing, remit the case to the Inquiry Authority for further inquiry and report and the Inquiry Authority shall thereupon proceed to hold further inquiry in terms of the provisions of Rules 14 as far as may be.

11. Therefore, in the light of the provisions of Rule 15 (1) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, it cannot be disputed that in a case where the Disciplinary Authority is itself not the Inquiry Authority, then upon receipt of the Inquiry Report, for the reasons to be recorded by it in writing, it can remit the case back to the Inquiry Authority for further inquiry.

12. Before proceeding further, I will refer to the judgments which have been relied upon by the parties concerned. I will first refer to the judgment relied upon by learned Counsel for the petitioner.

13. Hon'ble Supreme Court in *K.R. Dev* Versus *The Collector of Central Excise, Shillong*, *1971 (2) Supreme Court Cases 102* (Five Judges) has been pleased to hold in para-12 thereof that Rule-15 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 on the face of it really provides for one inquiry, but it may be possible, if in a particular case there has been no proper inquiry because some serious defect has crept into the inquiry or some important witnesses were not available at the time of inquiry or were examined for some other reasons, the Disciplinary Authority may ask the Inquiry Officer to record further evidence. However, there is no provision in Rule 15 for completely setting aside the previous inquiries on the ground that the report of the Inquiry Officer or Officers does not appeals to the Disciplinary Authority. Hon'ble Supreme Court has been further pleased to hold that the Disciplinary Authority has enough powers to reconsider the evidence itself and come to its own conclusion under Rule-9.

14. Now, I will refer to the judgment relied upon by learned Additional Advocate General. In *Union of India and Others* Versus *P. Thayagarajan, (1999) 1 Supreme Court Cases 733*, Hon'ble Supreme Court of India has been pleased to hold as under:-

> "5. Shri K.T.S. Tulsi, learned Senior Counsel appearing for the respondent, relied upon the decision of this Court in K.R. Deb v. Collector of Centrai Excise, Shillong 1971 (2) SCC 102, wherein, while interpreting Rule 15 of the Central Civil Services (Classification, Control and Appeal) Rules, 1957, it was held that

the Disciplinary Authority has no power to set aside an earlier enquiry and order a fresh enquiry. He submitted that this decision makes it clear that it is not open to the Disciplinary Authority to order to conduct a fresh enquiry in this matter. Therefore, he urged that the view taken by the High Court is justified.

6. In order to satisfy ourselves of the correctness of the contentions raised on behalf of the parties, we called for the original record of the enquiry and of the Disciplinary Authority and on going through the same, we find that letters addressed to the Enauiry Officer have been treated as statements made before him of U.N.Chaini (PW2) and letter sent by K.M.Verghese, who was to be examined as a defence witness.

7. What is contemplated in Rule 27(c) (2) is that evidence material to the charge could be either oral or documentary and if oral, (i) it shall be direct; (ii) it shall be recorded by the officer conducting the enquiry himself or by any officer; and (iii) the accused shall be allowed to cross examine the witness. When reliance is sought to be placed on oral evidence of witnesses it will have to be obtained in the manner indicated in the said Rule and that the oral statement has to be recorded by the officer himself conducting the enquiry in the presence of the parties and it cannot be done in any other manner. The procedure in taking letters as statements is in violation of Rule 27(c) (2). Therefore the contention put forth on behalf of the appellant and the reasons set forth in the course of the order setting aside the enquiry is justified. What Shri Tulsi urged with reference to the decision in K.R.Deb [supra] is that there is no power in the Disciplinary Authority to set aside an earlier enquiry and to order a fresh enquiry. We may, in particular, refer to para 12 of the said decision which is as follows :

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

8. A careful reading of this passage will make it clear that this Court notices that if in a particular case where there has been no proper enquiry because of some serious defect having crept into the inquiry or some important witnesses were not available at the time of the inquiry or were not examined, the Disciplinary Authority may ask the Inquiry Officer to record further evidence but that provision would not enable the Disciplinary Authority to set aside the previous enquiries on the ground that the report of the Enquiry Officer does not appeal to the Disciplinary Authority. In the present case the basis upon which the Disciplinary Authority set aside the enquiry is that the procedure adopted by the Enquiry Officer was contrary to the relevant rules and affects

> the rights of the parties and not that the report does not appeal to him. When important evidence, either to be relied upon by the Department or by the delinquent official, is shut out, this would not result in any advancement of any justice but on the other hand result in a miscarriage thereof. Therefore we are of the view that Rule 27(c) enables the Disciplinary Authority to record his findings on the report and to pass an appropriate order including ordering a de novo enquiry in a case of present nature.
>
> 9. The reasoning adopted by the Division Bench of the High Court was plainly incorrect. Whatever may be the powers of the appellate authority, the Disciplinary Authority will have to be satisfied with the procedure adopted by the Enquiry Officer before passing an order. It does not stand the logic that in a given case the appellate authority could order a fresh enquiry and not the Disciplinary Authority at whose instance the enquiry began and which is not satisfied with the enquiry held for some vital defects in the procedure adopted. Therefore the order made by the High Court cannot be sustained. The same stands set aside and we allow the appeal and dismiss the writ petition filed by the respondent".

15. Coming to the facts of this case, a perusal of the order passed by the Disciplinary Authority, vide which de-novo inquiry has been ordered, demonstrates that what weighed with the Disciplinary Authority while passing said order *inter alia* were the facts that the factum of two Jeepable roads having been constructed through the forest land which was apparent from the office record at Government level, had not been addressed by the Inquiry Officer in the Inquiry Report and though the Presenting Officer in his brief had held that delinquent officials were responsible for causing huge loss due to illicit felling of trees, but the Inquiry Officer could not prove the involvement of the delinquent officials. What further weighed with the Disciplinary Authority was the fact that the role of witnesses was suspicious as out of four witnesses, three had stated that the trees were very old whereas the fourth witness had stated that the trees were felled within a year. It was further observed by the Disciplinary Authority that Shri Heera Lal, witness who had stated that list of illicitly felled of trees was prepared on the spot which was duly signed by him and delinquent officials proved that they were guilty. This weighed with the Disciplinary Authority while observing that the Government had not accepted the Inquiry Report as submitted by the Inquiry Officer and a de-novo inquiry was proposed.

16. In my considered view, the order passed by the Disciplinary Authority of not accepting the Inquiry Report on account of the reasons mentioned in order dated 07.01.2020 and further ordering a de-novo inquiry by appointing a fresh Inquiry Officer is not sustainable in the eyes of law in view of the judgment of Hon'ble Supreme Court in K.R. Dev's case (supra). In the aforesaid judgment, Hon'ble Supreme Court has very clearly and categorically laid down the law that there is no provision in Rule 15 of the Central Civil Services (Classification, Control and

Appeal) Rules, 1965 for completely setting aside previous inquiry on the ground that the report of the Inquiry Officer/Officers does not appeals to the Disciplinary Authority. Of course, in this very judgment, Hon'ble Supreme Court has further held that Rule-15 indeed provides that if in a particular case there has been no proper inquiry because some serious defect has crept therein or some important witnesses were not available at the time of inquiry or were not examined etc., then the Disciplinary Authority may ask the Inquiry Officer to record further evidence. To this extent, in my considered view the right of the Disciplinary Authority cannot be curtailed by the Court. The judgment of Hon'ble Supreme Court in *Union of India and Others* Versus *P. Thayagarajan, (1999) 1 Supreme Court Cases 733*, relied upon by learned Additional Advocate General is of no assistance to the State in the peculiar facts of this case because said judgment was based on interpretation of provisions of Rule-27 (c) (6) of the Central Reserve Police Force Rules, 1955 and therein was a case where the Disciplinary Authority had set aside the inquiry on the ground that procedure adopted by the Inquiry Officer was contrary to the relevant Rules which affected the rights of the parties and not on the ground that the report did not appeal to him.

17. Accordingly, in view of the discussions held hereinabove and in view of the law laid down by Hon'ble Supreme Court in *K.R. Dev's case (supra)*, this writ petition is partly allowed by setting aside order dated 07.01.2020, passed by the Disciplinary Authority, vide which the Inquiry Report submitted by the Inquiry Officer is stated to be not accepted by the Government and a de-novo inquiry has been ordered, with the direction that the Disciplinary Authority shall be at liberty to proceed with the matter in terms of the provisions of Rule-15 (1) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 and can remit the matter back to the Inquiry Authority for further Inquiry and report. In the event of the Officer who earlier conducted the inquiry not being available, the Disciplinary Authority will be at liberty to appoint a fresh Inquiry Officer. With these observations, present writ petition stands disposed of. No order as to costs. Pending miscellaneous applications, if any, also stand disposed of. Interim order, if any, stands vacated.

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

1. **Cr. Revision No.346 of 2019**

Bhim Sain ....Petitioner

Versus

Anisha and another ....Respondents

2. **CMPMO No.390 of 2020**

Bhim Sain ....Petitioner

Versus

Anisha ....Respondent

Cr. Revision No.346 of 2019a/w
CMPMO No.390 of 2020
Date of decision: 8.10.2020

Code of Criminal Procedure, 1950- Section 125- Sections 397/401- Petition under Section 125 Cr.PC filed by respondents allowed by Ld. Session Judge (Family Court) Mandi-Prayer made to set aside and quash order for grant of maintenance- Held, that respondent wife has received sum of Rs. 8 lac towards permanent alimony pursuant to compromise between parties resolving to dissolve marriage by mutual consent- Petition under section 13-B filed by the parties allowed- Order dated 5.7.2019 for grant of maintenance quashed and set aside- Both the petitions disposed off. (Paras 6, 8, 11 & 15).

Cases referred:

Priyanka Khanna v. Amit Khanna, (2011) 15 SCC 612;
Veena Vs. State (Government of NCT of Delhi) and another, (2011) 14 SCC 614;

For the Petitioner(s): Mr. Sandeep Datta, Advocate.

For the Respondent(s): Ms. Komal Chaudhary, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Being aggrieved and dissatisfied with the order dated 5.7.2019 passed by learned Sessions Judge (Family Court) Mandi, District Mandi, Himachal Pradesh, in Criminal Petition No.42/19/2016, whereby petition under Section 125 Cr.P.C, having been filed by the respondents for grant of maintenance came to be allowed, petitioner-husband has approached this Court in the instant proceedings filed under Sections 397/401 of the Code of Criminal Procedure, praying therein to set-aside the aforesaid impugned order dated 5.7.2019 passed by learned Sessions Judge (Family Court) Mandi, H.P.

2. Precisely, the facts of the case as emerge from the pleadings available on record are that marriage *inter se* petitioner and respondent No.1 was solemnized in the month of February, 2014 as per Hindu Rites and Customs. Respondent No.2, who is minor born out of aforesaid wedlock *inter se* petitioner and respondent-wife. Parties to the *lis* cohabited together as husband and wife cordially for some, but unfortunately, some dispute cropped up between them, as a consequence of which, they started living separately. Respondent namely, Anisha along with her minor daughter filed petition under Section 125 Cr.P.C., for grant of maintenance in the Court of learned Sessions Judge (Family Court) Mandi, District Mandi, H.P., which came to be decided on 5.7.2019, whereby Family Court directed the petitioner-husband to pay sum of Rs.4000/- per month to respondent No.1 (wife) and Rs.3000/- to respondent No.2, till her marriage from today. In the aforesaid background, petitioner-husband approached

this Court in the instant proceedings, praying therein to set-aside aforesaid impugned order passed by learned Court below.

3. Having regard to the nature of controversy inter se parties, this Court while taking cognizance of the petition at hand, deemed it fit to summon both the parties to the Court, so that possibility of amicable settlement, if any, could be explored.

4. On 23.9.2019, this Court having interacted with the parties found that parties are not agreeable to live together and as such, they exchanged offers, so that their marriage could be dissolved by way of mutual consent.

5. On 8.11.2019, learned counsel representing the parties under instructions of their respective clients informed this Court that both the parties have entered into the compromise and as per agreed terms, sum of Rs. 8.00 lac would be paid by the petitioner-husband to the respondent-wife towards full and final settlement in three installments; first installment of Rs.2.00 lac would be paid on or before 22.11.2019; second installment of Rs.2.00 lac on or before 9.1.2020; and last installment of Rs.4.00 lac on or before 31.3.2020. Besides above, respondent-wife also prayed that petitioner-husband may be directed to pay some of Rs.5000/- per month to respondent No.2 i.e. his daughter till her marriage.

6. Today i.e. on 8.10.2020, parties have come present before this Court. They both on oath stated before this Court that they of their own volition and without there being any external pressure have entered into the compromise, whereby they both have decided to end their marriage with mutual consent, for which purpose, a separate petition under Section 13-B of Hindu Marriage Act, praying therein for dissolution of their marriage by way of mutual consent has been filed. Respondent-wife also stated before this Court that she has received sum of Rs.8.00 lac towards permanent alimony from the petitioner-husband and thereafter she shall have no claim against the petitioner-husband in future and shall have no objection in case petition under Section 13-B of the Hindu Marriage Act, having been filed by her alongwith the petitioner is allowed. Their statements are taken on record. Application filed under Section 13-B of the Hindu Marriage Act, is ordered to be registered separately by the Registry of this Court, enabling this Court to pass appropriate orders in those proceedings

7. In view of the above, learned counsel representing the parties state that in view of the aforesaid development, order 5.7.2019 passed by learned Court below may be quashed and set-aside

8. Accordingly, the present petition is allowed and order dated 5.7.2019 passed by learned Court below is quashed and set-aside alongwith pending applications, if any.

CMPMO No. 390 of 2020

9. By way of instant petition filed under Section 13-B of the Hindu Marriage Act, joint prayer has been made on behalf of the parties to the lis for dissolution of their marriage by mutual consent. Since, facts in detail leading to separation interse petitioner and respondent No.1 as well as amicable settlement interse them in the aforesaid criminal proceedings stand duly elaborated in the earlier part to the judgment recorded by this Court while disposing of the criminal petition, there appears to be no necessity to narrate the same again as it would unnecessary burden the judgment.

10. In the instant petition, it has been averred on behalf of the parties that they are living separately from each other for the last five years at their respective addresses mentioned in the memo of parties and during this period there has been no cohabitation as such and there is no relationship of husband-wife between them. Parties have further stated in the petition that they have mutually agreed for their marriage to be dissolved because there has been no cohabitation between them and there is no likelihood of their cohabiting in future and their marriage has been broken beyond repair. Factum with regard to amicable settlement arrived interse them in Criminal Petition No.346/2019 stands duly mentioned in the instant petition, wherein factum with regard to receipt of sum of Rs.8.00 lac by respondent-wife stands duly acknowledged towards permanent alimony. In view of aforesaid settlement arrived interse parties, parties have entered into Divorce Deed (Annexure P-1) annexed with the petition, perusal whereof reveals that petitioner has paid sum of Rs.8.00 lac to the respondent-wife as one time settlement, whereas respondent-wife has agreed that she will not claim any maintenance in future from the petitioner and shall have no claim of any kind against the petitioner. Both the parties have mutually agreed to withdraw cross-cases instituted by them against each other.

11. Having taken note of averments contained in the joint petition filed under Section 13-B of Hindu Marriage Act as well as statements of the parties and contents of divorce deed annexed with the petition, this Court sees no impediment in accepting the prayer made in the petition, especially when there is no possibility of rapprochement or conciliation between the parties.

12. Accordingly, for the reasons and circumstances narrated hereinabove, present petition filed under Section 13-B of the Hindu Marriage Act deserves to be allowed. Since both the parties are living separately for the last five years and they have been litigating with each other, statutory period of six months as envisaged under the Act for grant of divorce by way of mutation consent, can be waived of, especially when there is no possibility of rapprochement of the parties and marriage has broken beyond repair. In this regard, it would be apt to take note

of the judgment rendered by the Hon'ble Apex Court in **Veena Vs. State (Government of NCT of Delhi) and another,** (2011) 14 SCC 614, wherein the Hon'ble Apex Court has held as under:-

> 12." We have heard the learned counsel for the parties and talked to the parties. The appellant has filed a divorce petition under Section 13(1)(a) of the Hindu Marriage Act, 1955, being HMA No.397/2008 which is pending before the Court of Sanjeev Mattu, Additional District Judge, Karkardooma Courts, Delhi. In the peculiar facts and circumstances of this case, we deem it appropriate to transfer the said divorce petition to this Court and take the same on Board. The said petition is converted into one under Section 13B of the Hindu Marriage Act and we grant divorce to the parties by mutual consent."

13. Reliance is also placed on a judgment rendered by Hon'ble Apex Court in **Priyanka Khanna** v. **Amit Khanna**, (2011) 15 SCC 612, wherein Hon'ble Apex Court has held as under:-

> "7. We also see form the trend of the litigations pending between the parties that the relationship between the couple has broken down in a very nasty manner and there is absolutely no possibility of a rapprochement between them even if the matter was to be adjourned for a period of six months as stipulated under Section 13-B of the Hindu Marriage Act. 8. We also see from the record that the first litigation had been filed by the respondent husband on 2.6.2006 and a petition for divorce had also been filed by him in the year, 2007. We therefore, feel that it would be in the interest of justice that the period of six months should be waived in view of the above facts."

14. In the instant case also, statutory period of six months deserves to be waived keeping in view the fact that the marriage between the parties has broken beyond repair and there seems to be no possibility of parties living together. The Hon'ble Apex Court in Civil Appeal No.11158 of 2017 [arising out of Special Leave Petition (Civil) No.20184 of 2017] titled as **Amardeep Singh vs. Harveen Kaur**, decided on 12.09.2017, has held as under:-

> "13. Learned amicus submitted that waiting period enshrined under Section 13(B)2 of the Act is directory and can be waived by the court where proceedings are pending, in exceptional situations. This view is supported by judgments of the Andhra Pradesh High Court in K. Omprakash vs. K. Nalini 10, Karnataka High Court in Roopa Reddy vs. Prabhakar Reddy11, Delhi High Court in Dhanjit Vadra vs. Smt. Beena Vadra12 and Madhya Pradesh High Court in Dinesh Kumar Shukla vs. Smt. Neeta13. Contrary view has been taken by Kerala High Court in M. Krishna Preetha vs. Dr. Jayan 10 AIR 1986 AP 167 (DB) 11 AIR 1994 Kar 12 (DB) 12 AIR 1990 Del 146 13 AIR 2005 MP 106 (DB) Moorkkanatt14. It was submitted that Section 13B(1) relates to jurisdiction of the Court and the petition is maintainable only if the parties are living separately for a period of one year or more and if they have not been able to live together and have agreed that the marriage be dissolved. Section 13B(2) is procedural. He

submitted that the discretion to waive the period is a guided discretion by consideration of interest of justice where there is no chance of reconciliation and parties were already separated for a longer period or contesting proceedings for a period longer than the period mentioned in Section 13B(2). Thus, the Court should consider the questions:

i) How long parties have been married?
ii) How long litigation is pending?
iii) How long they have been staying apart?
iv) Are there any other proceedings between the parties?
v) Have the parties attended mediation/ conciliation?
vi) Have the parties arrived at genuine settlement which takes care of alimony, custody of child or any other pending issues between the parties?

14 AIR 2010 Ker 157

14. The Court must be satisfied that the parties were living separately for more than the statutory period and all efforts at mediation and reconciliation have been tried and have failed and there is no chance of reconciliation and further waiting period will only prolong their agony.

15. We have given due consideration to the issue involved. Under the traditional Hindu Law, as it stood prior to the statutory law on the point, marriage is a sacrament and cannot be dissolved by consent. The Act enabled the court to dissolve marriage on statutory grounds. By way of amendment in the year 1976, the concept of divorce by mutual consent was introduced. However, Section 13B(2) contains a bar to divorce being granted before six months of time elapsing after filing of the divorce petition by mutual consent. The said period was laid down to enable the parties to have a rethink so that the court grants divorce by mutual consent only if there is no chance for reconciliation.

16. The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of the cooling off the period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option.

17. In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have the regard to the context, the subject matter and the object of the provision. This principle, as

formulated in Justice G.P. Singh's "Principles of Statutory Interpretation" (9th Edn., 2004), has been cited with approval in Kailash versus Nanhku and ors.15as follows:

15 (2005) 4 SCC 480 "The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.' " 'For ascertaining the real intention of the legislature', points out Subbarao, J. 'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory." 18. Applying the above to the present situation, we are of the view that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13B(2), it can do so after considering the following :

i) the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year under Section 13B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony.

19. The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver.

20. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court.

21. Since we are of the view that the period mentioned in Section 13B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation."

15. Consequently, in view of the detailed discussion made hereinabove, petition filed under Section 13-B of the Hindu Marriage Act, is allowed and in view of the peculiar facts and circumstances as enumerated hereinabove as well as law laid down by the Hon'ble Apex Court, the marriage between the parties is ordered to be dissolved by mutual consent. Registry is directed to draw a decree of dissolution of marriage by mutual consent accordingly. Terms and conditions contained in the Divorce Deed dated 8.10.2020(Annexure P-1) referred hereinabove, shall also form part of the decree.

16. Needless to say, both the parties shall abide by all the terms and conditions contained in the application.

17. The instant petition filed under Section 13-B of the Hindu Marriage Act, is disposed of in the aforesaid terms. Pending applications, if any, are also disposed of.

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

Virender Kumar ...Petitioner

Versus

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

Cr. Revision No. 161 of 2020
Judgment reserved on 23rdSept.2020
Date of Decision 27th November,2020

Code of Criminal Procedure, 1973- Section 438-Interim bail order dated 12.9.2019 made absolute on 25.9.2019 imposing further conditions- Petitioner seeking modification of order dated 25.9.2019 directing him to surrender his passport on the ground of nature of job being in Merchant Navy – Held, that condition imposed on petitioner to seek permission to leave country would entail release of passport also- Filing application to seek such permission will not amount to review or recall of order dated 12.9.2019 and 25.9.2019- Cancellation of bail for breach of condition imposed, at the time of granting bail, does not amount to review or modification of order granting bail- Petitioner directed to approach the Sessions Court by filing an appropriate application seeking permission to leave the country- Petition disposed of accordingly. (Paras 16, 20 & 22).

Cases referred:

Abdul Basit @ Raju and others. vs. Mohd. Abdul Kadir Chaudhary and another, reported in (2014)10 SCC 754;
Chief Enforcement Officer/Enforcement Director and another vs. Jairaj V. Java, reported in (2000)9 SCC 232;
Gian Singh vs. State of Rajasthan, reported in (1999)5 SCC 694;
Hazari Lal Gupta vs. Rameshwar Prasad and another reported in AIR 1972 SC 484;
Mohammed Kunju and another vs. State of Karnataka reported in AIR 2000 SC 6;
Sunil K. Sinha vs. State of Bihar reported in AIR 1999 SC 1533;
Supreme Court Legal Aid Committee Representing Undertrial Prisoners vs. Union of India and another reported in (1995)5 SCC 695;

For the Petitioner:	Mr. Sahil Malhotra, Advocate through Video Conferencing.
For the Respondents:	Mr. Desh Raj Thakur, Additional Advocate General, for respondent No.1 and Mr.Neeraj K. Sharma, Advocate, for respondent No.2, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Petitioner has approached this Court for modification of order dated 12.9.2019 passed by learned Sessions Judge, Mandi in Bail Application No. 187 of 2019, titled Virender Kumar vs. State of H.P., whereby condition to surrender the passport by petitioner at the time of granting the bail has been imposed upon the petitioner. Petitioner is also praying for direction to Investigating Officer to return his passport so as to enable him to visit abroad and earn his livelihood.

2 Petitioner is an accused in a case FIR No. 37 dated 9.9.2019, registered in Police Station Women Police Station Mandi at Bhiuli under Sections 498-A, 323, 506 and 34 of Indian Penal Code.

3 On 12.9.2019, in an application preferred by petitioner under Section 438 of Cr.P.C., he, in the event of arrest, was directed to be enlarged on bail on furnishing personal and surety bonds and was also directed to surrender his passport before the Investigating Officer.

4. On 25.9.2019 interim order dated 12.9.2019 was made absolute, subject to further conditions imposed by Sessions Judge, Mandi. Therefore, order dated 12.9.2019 and conditions imposed therein have now merged in order dated 25.9.2019.

5. On 25.9.2019, amongst other conditions imposed, there was condition No.3, whereby petitioner was directed that he shall not leave the country without prior permission of Investigating Officer/Court.

6 Though, petitioner has prayed for modification of order dated 12.9.2019, instead of 25.9.2019, however ignoring this technicality, present petition is being considered to

have been filed for modification of order dated 25.9.2019 wherein order dated 12.9.2019 has merged.

7 Earlier petitioner had also approached the trial Court i.e. Additional Chief Judicial Magistrate, Court No.1, Mandi for release of his passport. Vide order dated 16.1.2020, his application was dismissed by the trial Court on the ground that petitioner was admitted to bail, by imposing condition of surrendering the passport, by learned Sessions Judge, Mandi, and therefore, petitioner should have placed such an application in the Court of learned Sessions Judge, Mandi as the trial Court was not having the power to dilute the condition imposed at the time of granting bail to petitioner by learned Sessions Judge.

8 Learned counsel for petitioner, referring pronouncement of the Apex Court, in case ***Abdul Basit @ Raju and others. vs. Mohd. Abdul Kadir Chaudhary and another,*** reported in ***(2014)10 SCC 754,*** that once a Court finally disposes of the issue in consideration and grants relief of bail to petitioner therein the Court becomes functus officio and Section 362 of Cr.PC applies therein barring the review of judgment and order of Court granting bail to petitioner/accused and therefore, learned Sessions Judge was not having any power to review his order passed in bail application, whereby condition has been imposed upon petitioner to surrender his passport, therefore, petitioner was not having any other remedy except filing the present petition in this Court.

9 Learned counsel for petitioner has also referred judgment of the Supreme Court passed in ***Gian Singh vs. State of Rajasthan,*** reported in ***(1999)5 SCC 694,*** whereby in order to avoid irreparable suffering to petitioner/accused therein directions were issued to trial Court to return his passport on execution of a bond by him for a sum of Rs.3 lac with two solvent sureties to the satisfaction of the said Court and petitioner therein was permitted to appear before the trial Court through Advocate except on dates when his presence was indispensable.

10 Learned counsel for petitioner has also placed reliance upon judgment of Karnataka High Court in case ***Brijesh Singh and etc. vs. State of Karnataka and etc.,*** reported in ***2002 Cri.LJ 1362,*** wherein after taking into consideration pronouncement of the Supreme Court and undertaking of petitioner to furnish additional security for taking delivery of passport from the trial Court, to ensure his attendance as and when required on hearing dates in the course of trial proceedings against him, passport of accused/husband was released.

11 It is submitted by learned counsel for petitioner that petitioner is earning his livelihood by serving in Merchant Navy and for that purpose, he is frequently required to go out of India and conditions imposed by learned Sessions Judge to surrender his passport has caused great prejudice and hardship to him as on account of that, he has been restrained to work outside India, which is affecting his fundamental rights to earn livelihood as enshrined

under Article 21 of Constitution of India. It is contended by him that keeping in view the antecedents of petitioner and nature of offence alleged to have been committed by petitioner in present case, the condition of surrendering his passport is a harsh condition particularly when investigation is complete and presence of petitioner is not necessary before Investigating Officer and/or also before the Court on every date and further that petitioner is ready to appear before the Court/Investigating Officer as and when it is considered necessary by Court or Investigating Officer.

12 To substantiate the claim that petitioner had been earning his livelihood by serving as a Seaman in Merchant Navy with different Companies, affidavits dated 19.8.2020 and 11.9.2020 have also been filed during pendency of present petition giving details of his employment and earning therefrom.

13 So far as imposition of condition to surrender the passport is concerned, in view of the pronouncements of the Apex Court in ***Sunil K. Sinha vs. State of Bihar*** reported in ***AIR 1999 SC 1533; Chief Enforcement Officer/Enforcement Director and another vs. Jairaj V. Java,*** reported in ***(2000)9 SCC 232, Hazari Lal Gupta vs. Rameshwar Prasad and another*** reported in ***AIR 1972 SC 484; Mohammed Kunju and another vs. State of Karnataka*** reported in ***AIR 2000 SC 6*** and ***Supreme Court Legal Aid Committee Representing Undertrial Prisoners vs. Union of India and another*** reported in ***(1995)5 SCC 695,*** the Court is empowered to impose such conditions. But imposition of such conditions and release of passport, so surrendered, depends upon facts and circumstances of each case and Court has to pass an appropriate order after taking into consideration given facts and circumstances of the case on its own merits by balancing the individual interest of accused and complainant and also larger interest of public to ensure the presence of an accused before the Court during trial.

14 It is true that vide order dated 25.9.2019, learned Sessions Judge has finally disposed of bail application preferred by petitioner, and condition of surrendering the passport by petitioner, imposed on 12.9.2019 has also merged and re-affirmed in order dated 25.9.2019, but it is also noticeable that there is condition No.3 enabling the petitioner to seek permission of Investigating Officer or the Court to leave the country and in case such permission is granted to petitioner, the natural corollary thereof would be the entitlement of petitioner to have his passport released from Investigating Officer. In case, petitioner is found entitled for permission to leave the country to earn his livelihood, the Court has to release the passport of petitioner. Needless to say that at the time of passing order of release of passport, the Court may impose condition of furnishing separate surety bond(s) for an amount as considered by Court just and reasonable taking into consideration the entire facts and circumstances of case and petitioner

may be directed to ensure his presence on the dates as and when his presence is indispensable during trial with further direction to him to ensure his representation on each and every date of hearing through an Advocate and failure to ensure that, would definitely be resulted into cancellation of bail for breach of condition imposed upon petitioner at the time of granting the bail.

15 Plea raised on behalf of petitioner that Sessions Court is not empowered to review or recall its earlier orders passed on 12.9.2019 and 25.9.2019 is not applicable in present case for the reason that in order dated 25.9.2019 itself, there is condition that applicant shall not leave the country without prior permission of Investigating Officer/Court entitling the petitioner to file an appropriate application before the same Court to seek permission to leave the country and therefore, allowing or disallowing such application by learned Sessions Court cannot be treated as modification, variation, recalling or review of earlier orders passed by Court at any stretch of imagination, rather, it would be in continuation and in consonance with earlier orders passed by the said Court.

16 Cancellation of bail on re-appreciation of same facts by the same Court would amount to review of earlier order, but, cancellation of bail for breach of condition imposed, at the time of granting bail, does not amount to review or modification of earlier order grating the bail, rather it would be in consonance with and in continuation to the previous order wherein cancellation of bail on breach of condition is inherent, for the reason that bail is granted subject to certain condition(s), breach whereof would entail cancellation of the bail. At the time of granting bail, normally a condition is imposed and I would say that it is always desirous to impose such condition that in case of violation of breach of any condition imposed upon the accused at the time of granting the bail, his bail shall be liable to be cancelled and in such eventuality, prosecution should be granted liberty to approach the competent Court of law for cancellation of bail in accordance with law. It is not modification or review of the order but an order consequential to the previous order.

17. Similarly, modification of condition(s) imposed at the time of granting bail, after taking into consideration new, additional or other facts, not considered earlier, also does not amount to review of previous order, particularly when order itself contains the condition that conditions, so imposed, may be varied, modified and/or altered suitably as and when it would be deemed fit by the Court in the facts and circumstances of the case.

18. Normally at the time of granting/confirming the bail by the Sessions Court and/or High Court, a condition is imposed that it will be open to prosecution to apply for imposing any such other or further condition on petitioner as deems necessary in the facts and circumstances of the case and in the interest of justice and also that it shall also be open to

trial Court to impose any other or further condition on petitioner as it may deem necessary in the interest of justice. For such condition, imposed at the time of granting the bail, the trial Court shall also be competent to impose any other or further condition on petitioner either *suo moto* or on request of prosecution including modification of condition on the application of accused in changed circumstances as deemed necessary in the interest of justice, as, in view of specific condition contained in order, such addition, modification or alteration in the condition by the trial Court shall be consequential extension of order passed by Court at the time of granting the bail. In present case, unfortunately, no such condition has been imposed by learned Sessions Judge. To some extent, condition No.3 may be taken as a condition empowering the trial Court to consider the case of petitioner for permission to leave India, but, here also, it is not clear that 'Court' referred in the said condition means the Court granting the bail or also includes the trial Court. Therefore, the trial Court has rightly rejected the application filed by petitioner for alteration of condition imposed in order granting the bail to him.

19. Keeping in view the provisions of Section 362 Cr.P.C., it would be desirous that at the time of granting the bail, the Court should incorporate the condition in bail order itself empowering the same Court and the trial Court to impose any other or further condition or alter/modify the conditions already imposed on application of prosecution or the accused as deemed necessary by such Court for ends of justice. Though, it is inherent in order, however, by way of abundant caution, it may also be specifically incorporated in order granting the bail that such bail shall liable to be cancelled by the competent Court on breach/violation of any condition imposed upon accused at the time of granting the bail and prosecution should be granted liberty to approach the competent Court of law, in that eventuality, for cancellation of bail in accordance with law.

20 Release of passport has been opposed by complainant/wife/respondent No.2 by raising various contentions narrated in reply and submitted by learned counsel representing her during course of arguments. The said contentions are not discussed herein for the reason that this Court is not passing any order for release of passport of petitioner at this stage by directing the petitioner to approach the same Court, which has imposed the condition to seek permission to leave the country and also for release the passport in case such permission is granted by the said Court. Release of passport shall precede permission to leave India.

21. No opinion with respect to merit of rival contentions raised by parties for seeking and opposing release of passport are being expressed by this Court.

22. In view of aforesaid discussions and in the peculiar facts and circumstances of the case, petitioner is directed to approach the Sessions Court by filing an appropriate

application seeking permission to leave the country and also for consequential relief that in case permission, so prayed, is granted to petitioner, for release of his passport.

23 Parties are at liberty to raise all contentions before learned Sessions Judge, who, after taking into consideration all such contentions shall pass an order on its own merits in accordance with law.

Petition stands disposed of in aforesaid terms.

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

Smt. Mehandi Devi ..... Petitioner

versus

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

CWP No: 1041 of 2020
Date of Decision:12.11.2020

Constitution of India, 1950-Article 226- Husband of petitioner regularized as Peon in Forest Department granted work charge status from 1.1.2001 in terms of directions in CWP No. 3266 of 2012 filed by petitioner after his death- Petitioner claiming full arrears of work charge status and family pension- Held, that husband of petitioner remained silent regarding claim of arrears till his death i.e, 18.4.2010, arrears can not be granted till 18.4. 2010- Arrears to be restricted to 3 years prior to filing CWP NO. 3266 of 2012, but calculated for the period 3 years prior to death of husband of petitioner- Claim for arrears of work charge rejected- Further, work charge status followed by regular appointment to be counted as qualifying service for pension and retiral benefits- Petitioner held entitled to family pension being nominee / legal heir of late Dhajju Ram – Petition partly allowed. (Paras 5, 7 & 11)

For the Petitioner: Mr. A. K.Gupta, Advocate, through video-conferencing.

For the Respondents: Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General, for the respondents/State, through video-conferencing.

Mr.Balram Sharma, Advocate, for respondent No.5, through video-conferencing.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge*(oral)*

Late husband of petitioner Sh. Dhaju Ram was engaged on daily wage basis in Shri Renukaji Forest Division with effect from 1.1.1991 but subsequently, after completion of 8

years continuous service with 240 days in a calendar year, his services came to be regularized as Peon with effect from 31.7.2006 in the aforesaid Forest Division vide office order No. 111/2006-07 dated 1.12.2006 as per regularisation policy in vogue. Husband of the petitioner expired on 18.4.2010, whereafter petitioner filed CWP No. 3266 of 2012 titled as **Smt. Mehandi Devi vs. State of HP and others,** seeking therein directions to the respondents to grant work charge status to her late husband, from the date he had completed requisite years. Principal Chief Conservator of Forests vide office order No. 977/2012 dated 28.9.2012 granted work charge status to late husband of the petitioner with effect from 1.1.2001 in terms of directions issued by this Court in the aforesaid writ petition (Annexure R-1).

2. Though, in the case at hand, sum of Rs.47,275/- stands paid to the petitioner vide bill No. 26, dated 20.1.2014 on account of arrears of work charge status but since the petitioner has not been given full arrears and her request for grant of family pension has been denied, she has approached this Court in the instant proceedings, praying therein for following reliefs:

> "(i). That the respondents may be ordered to pay the arrears to the petitioner on account of work charge status given to her late husband, as has been done in the similarly situated cases and being nominee of her late husband the petitioner is entitled to all monetary benefits which accrued to her late husband during his service carrier.
>
> (ii). That the respondents may be ordered to be work out family pension of the petitioner from the due date with all the benefits incidental thereof."

3. Having heard learned counsel for the parties and perused the pleadings adduced on record by respective parties, especially reply filed by respondents Nos. 1 to 4, this court finds that though there is no dispute inter se parties that late husband of the petitioner was engaged on daily wage basis in the Forest Department with effect from 1.1.1991 and his services were subsequently regularized against the post of Peon with effect from 31.7.2006. It is also not in dispute that pursuant to judgment dated 7.5.2012, passed by this Court in CWP No. 3266 of 2012, late husband of the petitioner was granted work charge status with effect from 1.1.2001. As per the reply filed on behalf of the respondents, though in terms of clarification received from the Government of Himachal Pradesh vide letter No. FFE-B-B(7)-28/2013 dated 6.3.2013, arrears on account of work charge status were to be restricted to 3 years prior to the date of filing of the writ petition but since husband of petitioner had expired on 18.4.2010, department calculated arrears for the period prior to three years from the date of death of the husband of petitioner. As per the respondents, sum of Rs.47,275/-stands paid to the petitioner on account of arrears and as such, there appears to be no force in the prayer

made on behalf of the petitioner for issuance of directions to the respondents to pay arrears on account of conferment of work charge status in favour of late husband of the petitioner. Otherwise also, this Court finds that a sum of Rs. 47,275/- was paid to the petitioner vide Bill No. 26, dated 20.1.2014, Annexure R-3 and at that time, no objection, if any, ever came to be raised on behalf of the petitioner with regard to the amount calculated by the respondents on account of arrears.

4. Though, in the case at hand, arrears on account of work charge status were required to be restricted to three years prior to filing of Civil Writ Petition in terms of clarification dated 6.3.2013, issued by the Government of Himachal Pradesh, but the Department having taken note of death of late husband of the petitioner, restricted the arrears prior to three years from the date of his death i.e. 18.4.2010, meaning thereby, he was given all the financial benefits on account of conferment of work charge status with effect from April, 2007, whereas, such benefits in normal circumstances ought to have been give with effect from 1.1.2001 i.e. the date from which petitioner was conferred work charge status.

5. It is not in dispute that late husband of the petitioner during his life time never raised dispute or filed petition with regard to grant of work charge status rather, present petitioner after death of her husband, Dhaju Ram, filed CWP No. 3266 of 2012, seeking therein direction to the respondents to grant work charge status from the date he completed 10 years daily wage service. Pursuant to the direction issued by this Court in aforesaid writ petition, work charge status was conferred upon late husband of the petitioner with effect from 1.1.2001. Since late husband of the petitioner kept silent till his death i.e. 18.4.2010 no directions, if any, can be issued for payment qua aforesaid period i.e. 1.1.2001 to 18.4.2010. Since the petitioner approached this court in 2012, by way of CWP No. 3266 of 2012, arrears on account of work charge status were required to be restricted to 3 years prior to filing of CWP No. 3266 of 2012 but, in the case at hand, respondents ignoring instructions/clarifications issued by Government of Himachal Pradesh vide letter dated 6.3.2013, calculated arrears for the period, three years prior to date of death of late husband of the petitioner i.e. April, 2007 and as such, no direction can be issued to the respondents to pay arrears with effect from 1.1.2001.

6. Another claim of the petitioner for grant of family pension requires to be allowed. Respondents in their reply have claimed that claim made by petitioner for family pension is not admissible as per law since deceased husband of the petitioner was not eligible to be covered under the provisions of CCS (Pension) Rules, 1972 and such rules are only applicable to regular employees appointed on or before 15.5.2003. Besides above, respondents have claimed in the reply that since work charged employees are not covered under the

provisions of CCS (Pension) Rules, 1972, late husband of the petitioner is also not covered under such provisions, because his services were regularized with effect from 31.7.2006. Aforesaid plea taken by respondents is contrary to record because though at first instance services of petitioner were regularized against the post of Peon with effect from 31.7.2006 but it is an admitted fact that subsequently in terms of judgment dated 7.5.2012 delivered by this Court in CWP No. 3266 of 2012, late husband of the petitioner was granted work charge status with effect from 1.1.2001, Annexure R-1.

7. By now, it is well settled that work charge status followed by regular appointment has to be counted as a component towards qualifying service for the purpose of pension and other retiral benefits. In this regard, reliance is placed upon judgment rendered by Division Bench of this court in CWP No. 2384 of 2018, titled **State of Himachal Pradesh and others** vs. **Smt. Matwar Singh and others,** decided on 18.4.2012 (Annexure P-1/B), wherein it has been held 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 the light of view taken by this Court **in CWP No.6167 of 2017, titled Sukru Ram vs. State of H.P. & others**, decided on 6th March, 2013. A Full Bench of Punjab and Haryana High Court in Keshar Chand vs. State of Punjab through the Secretary P.W.D. B & R Chandigarh and others, (1988) 94(2) PLR 223, also dealt with an identical issue where Rule 3.17(ii) of the Punjab Civil Services Rules excluded the work charge service for the purpose of qualifying service. Setting aside the said Rule being violative of Articles 14 and 16 of the Constitution of India, it was held that the work charge service followed by regular appointment will count towards qualifying service for the purpose of pension and other retiral benefits. The aforesaid view was also confirmed by the Hon'ble Apex Court.

8. It is quite apparent from aforesaid exposition of law that work charge appointment followed by regularization is necessarily to be counted as component towards qualifying service for the purpose of pension and retiral benefits. Executive instructions, if any, issued by Finance Department are liable to be ignored/struck down in terms of the judgment rendered by this court in CWP No. 6167 of 2017, titled **Sukru Ram vs. State of Himachal Pradesh and others,** decided on 6.3.2013. Hence, services rendered by late husband of the petitioner on work charge status are required to be counted towards qualifying service for the purpose of pension and other retiral benefits.

9. Rule 54 of CCS (Pension) Rules, 1972 specifically deals with the family pension, which provides as under:

> **54. Family Pension, 1964**

(1) The provisions of this rule shall apply –

(a) to a Government servant entering service in a pensionable establishment on or after the 1st January, 1964; and

(b) to a Government servant who was in service on the 31st December, 1963 and came to be governed by the provisions of the Family Pension Scheme for Central Government Employees, 1964, contained in the Ministry of Finance, Office Memorandum No. 9 (16)-E. V (A)/63, dated the 31st December, 1963, as in force immediately before the commencement of these rules

NOTE. - The provisions of this rule will also extend, from 22nd September, 1977, to Government servants on pensionable establishments who retired/died before 31-12-1963, as also to those who were alive on 31-12-1963, but had opted out of 1964 Scheme.]

(2) Subject to the provisions of sub-rule 13-B and without prejudice to the provisions contained in sub-rule (3), where a Government servant dies -

(i) after completion of one year of continuous service; or

(ii) before completion of one year of continuous service, provided the deceased Government servant concerned immediately prior to his appointment to the service or post was examined by the appropriate medical authority and declared fit by that authority for Government service ; or

(iii) after retirement from service and was on the date of death in receipt of a pension, or compassionate allowance, referred to in these rules,

the family of the deceased shall be entitled to Family Pension (hereinafter in this rule referred to as family pension) under the Family Pension Scheme for Central Government Employees, 1964, the amount of which shall be determined at a uniform rate of 30% of basic pay subject to a minimum of three thousand and five hundred rupees per mensem and a maximum of twenty-seven thousand rupees per mensem.

EXPLANATION - The expression `one year of continuous service' wherever it occurs in this rule shall be construed to include `less than one year of continuous service' as defined in clause (ii).} '

10. Careful perusal of aforesaid rules clearly provides that persons having rendered more than one year service is entitled to family pension. Otherwise also this aspect of the matter has been dealt with by a coordinate bench of this Court in CWP No. 8894 of 2008, titled

Smt. Kalawati vs. The State of Himachal Pradesh, decided on 31.12.2012, which reads as under:

> "1. The petitioner is the wife of decease Roop Singh, who was working with the respondents. It is undisputed before me that deceased Roop Singh was offered a temporary post of work charged Beldar w.e.f.1.1.1994 in the pay scale of Rs. 770-1410 vide Annexure R2 on the terms and conditions as submitted therein. It is also undisputed before me that deceased Roop Singh died on 25.2.1995 and that he joined his services as daily waged Beldar in H.P.PWD, Rajgarh on 1.1.1984. Learned counsel for the petitioner relies upon Rule 54 sub-Rule (2)(a) of the CCS (Pension) Rules, 1972 to urge that since the deceased has put more than one year service with the State Government, he was entitled to family pension.
>
> 2. This prayer is opposed by the learned Assistant Advocate General primarily on the ground that there is nothing on the record to establish that after issuance of Annexure R-2, the deceased had actually joined service or not. I cannot accept this submission made on behalf of the respondents. According to the man-days charge (Annexure R-I) prepared by the respondents, the deceased reported for duty on January, 1994. There is nothing on the record placed by the respondents to show that the deceased Roop Singh had voluntarily abandoned services with the respondents"

11. Consequently, in view of the discussion made herein above as well as law laid down by this Court, petition at hand is partly allowed. First relief claimed by petitioner for grant of arrear on account of work charge status is rejected being devoid of merit, however, respondents are directed to grant family pension to the petitioner being nominee/legal heir of late Dhaju Ram, forthwith alongwith consequential benefits. Pending applications, if any, also stand disposed of.

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

Jia Lal ..... Petitioner

Versus

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

CWP No.1145 of 2020
Date of Decision: 5.10.2020

Constitution of India, 1950- Article 226- Petitioner regularized as forest worker in the respondent Department- Work charge status approved in favour of petitioner, arrears calculated and released- Claim of the petitioner to recalculate the pensionary benefits after his retirement counting his daily wage service and service rendered on work charge basis- Held, that work

charge services rendered by the petitioner to be counted for pension and other retiral benefits- Petition allowed. (Paras 3, 4 & 6)

Cases referred:

Kesar Chand versus State of Punjab and others, (1988) 94(2) PLR 223;

For the Petitioner : Mr. Onkar Jairath, Advocate, through video-conferencing.

For the Respondents : Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General, through video-conferencing

The following judgment of the Court was delivered:

Sandeep Sharma, Judge*(oral)*

In the year 1984, petitioner was appointed as forest worker on daily wage basis in the respondent-Department. Though, subsequently vide office order dated 2.3.1998, services of the petitioner came to be regularized on the recommendation of the Screening Committee and with the approval of competent authority, but since work charge status was not granted to him on his having completed requisite period, he approached this Court by way of CWP(T) No.9178 of 2008, which came to be disposed of vide judgment dated 8.10.2010. Vide aforesaid judgment, respondents were directed to consider the case of the petitioner in the light of the directions given in ***Mool Raj Upadhayaya case and Gauri Dutt case.***

2. Pursuant to the aforesaid directions issued by this Court, case of the petitioner was referred to the Government to accord approval. The Principal Chief Conservator of Forests vide office letter dated 6.6.2011, conveyed the approval for grant of work charge status in favour of the petitioner w.e.f.1.5.1994 to 8.1.1998. The arrears were calculated and worked out to Rs. 1, 76, 164/- and same stands released in favour of the petitioner. Since after superannuation, services of the petitioner rendered in the capacity of work charge status has not been taken into consideration towards qualifying service for the purpose of pension and other retrial benefits, petitioner has approached this Court in the instant proceedings praying therein following reliefs:-

1) That a writ in the nature of mandamus or any other appropriate writ order or directions may kindly be issued directing the respondents to recalculate the pensionary benefits of the petitioner after having counted his daily wage service and service rendered on work charge basis as a qualifying service and grant pension to the petitioner in view of the judgment passed by Hon'ble Apex Court in Narata Singh's case alongwith all consequential arrear and interest @ 9%.
2) That the respondents may further be directed to pay the gratuity and Leave Encashment by the respondent department @ 9% p.a. for the

period of service rendered on daily wage basis in view of the judgment passed by Hon'ble High Court of H.P. in Lashkari Ram's case.

3. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that issue with regard to counting work charge services towards qualifying services for the purpose of pension and other retrial benefits stands settled vide judgment dated 18.12.2018, passed by Division Bench of this Court in CWP No.2384 of 2018, titled as ***State of Himachal Pradesh and others versus Sh. Matwar Singh and another*** and judgment dated 7.12.2018 passed in CWP No. 2882 of 2018 titled as ***State of H.P and others versus Uttam Chand and another,*** wherein Division Bench of this Court having taken note of its earlier judgment dated 6.3.2013 passed by this Court in CWP No.6167 of 2012 titled as ***Sukru Ram versus The State of Himachal Pradesh and others*** and the judgment passed by Full Bench of Punjab and Haryana High Court in case titled ***Kesar Chand versus State of Punjab and others***, (1988) 94(2) PLR 223, has categorically held that work charge services followed by regular appointment will count towards qualifying service for the purpose of pension and other retrial benefits.

4. Since learned Additional Advocate General has been not able to dispute that aforesaid judgments rendered by the Division Bench have attained finality, prayer made in the instant petition for counting work charge services rendered by the petitioner for the purpose of pension and other retrial benefits deserves to be allowed.

5. Mr. Onkar Jairath, learned counsel representing the petitioner fairly states that services rendered on daily wage is not liable to be taken into consideration while determining qualifying service for the purpose of pension because petitioner has already completed the requisite period for the purpose of pension.

6. Consequently, in view of the above, the present petition is allowed by making the directions in ***Matwar Singh's & Uttam Chand case (supra)*** *mutatis mutandi* applicable, also to the present petition. Consequential benefits on account of aforesaid relief extended in favour the petitioner shall be released expeditiously, preferably within a period of two months from today. Pending applications, if any, also stand disposed of accordingly.

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

Gurbachan Singh ....Petitioner

Versus

Resident Commissioner & Others ....Respondents

CWPOA No.2737 of 2020
Date of decision: 15.9.2020

Constitution of India, 1950:- Article 226-Petitioner initially appointed as Chowkidar on Daily wage basis on February, 2004- Continuing working without any break with 240 days in every calendar year- Petitioner not being regularized despite policy to requisite the service of daily wage employees after completion of 8 years- Held, petitioner be given work charge status from the date he had completed 8 years of continue service- Thereafter regularize his services in terms of policy framed by Court alongwith compensation benefits.

Cases referred:

Bhagwati Prasad v. Delhi State Mineral Development Corporation (1990) 1 SCC 361;

For the Petitioner: Mr. Vikas Rajput, Advocate, through video-conferencing.

For the Respondents: Mr. Sudhir Bhatnagar, Additional Advocate General with Mr. Kunal Thakur, Deputy Advocate General for the respondent-State, through video conferencing.

Mr. Vijay Arora, Advocate, for respondents No.2 to 4, through video-conferencing.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge(Oral)**:**

By way of instant petition, which initially came to be filed before the erstwhile H.P. Administrative Tribunal and now stands transferred to this Court and re-registered as CWPOA No.2737 of 2020, petitioner prayed for following reliefs:-

> **"(i) That respondents may kindly be directed to regularized the services of the applicant w.e.f. March, 2012 i.e. on completion of eight years of service on daily wager basis. Or in alternate work charge status may kindly be given to applicant on completion of eight years of service on daily wager basis.**
>
> **(ii) That applicant may be given all consequence benefit like seniority, pay fixation, arrears etc."**

2. For having bird's eye view, certain undisputed facts as emerge from the pleadings adduced on record by the respective parties are as under:-

(i) That in February 2004, petitioner was initially appointed as Chowkidar on Daily Wage Basis to watch & ward the office and store opened at project site of Sach MHEP (900 KW) (Pangi), District Chamba and since then he has been continuously working without any break with 240 days in every calendar year. Since, despite there being policy to regularize the services of Daily Wage employees after completion of eight years regular service, case of the petitioner

was not considered for regularization by respondent No.2 as such, he filed representation (Annexure A-1).

(ii) In September, 2013 petitioner alongwith another similarly situate employees made representation to the Hon'ble Chief Minister for regularization. Vide communication dated 09.10.2013 addressed to Principal Secretary to Hon'ble Chief Minister Chief Executive Officer, HIMURJA intimated that the petitioner is being paid salary from the funds of Tribal Development Department against Sach Hydel Electric Project, however as and when post would be available with Himurja, case of the petitioner would be considered for regularization.

(iii) Again in the month of September, 2014 petitioner made another representation (AnnexureA-3), praying therein for his regularization, but his case for regularization never came to be considered by the respondent.

(iv) Vide communication dated 3.1.2015, respondent No.2 while expressing its inability to regularize the services of the petitioner, requested respondent No.1 i.e. Resident Commissioner, Pangi at Killar, District Chamba, Himachal Pradesh to regularizes the services of the petitioner in its own establishment or in other departments under its control (Annexures A-5 to A-7). Vide aforesaid communications respondent No.2 reminded/ apprised respondent No.1 that since petitioner came to be appointed by the Selection Committee constituted by respondent No.1 coupled with the fact that his salary was being paid from the funds of Tribal Development Department, it is not in a position to take steps for regularization of the services of the petitioner, who otherwise has been regularly rendering his services in the capacity of Chowkidar on daily wage basis at Sach project.

3. Besides above, Project officer, Himurja, Pangi vide communication dated 14.11.2017 informed the Resident Commissioner, Pangi at Killar (respondent No.1) that as per record maintained in his office, present petitioner is working at MHEP Sach Pangi on muster roll basis since February, 2004 and his wages are being paid by his office from the budget received from Directorate (Himurja), Himachal Pradesh, Shimla from time to time. Since the case of the petitioner never came to be considered for grant of work charge status as well as for regularization despite his having completed requisite period, he was compelled to approach court of law in the instant proceedings, praying therein reliefs, as have been reproduced hereinabove.

4. Having heard learned counsel representing the parties and perused the pleadings adduced on record by the respective parties, this Court finds that there is no dispute

inter se parties that since February, 2004 petitioner has been regularly rendering his services on daily wage basis at Micro Hydel Project Sach in Pangi Chamba District and till date no steps, if any, have been taken by the respondents for regularization of his services despite there being policies framed by the Government for regularization of services of daily wage workers after completion of eight years regular service.

5. It is quite apparent from the material available on record that though initial appointment of the petitioner as Chowkidar on daily wage basis in the month of February, 2004 was made by selection committee constituted by the Resident Commissioner, Pangi at Killar, District Chamba, Himachal Pradesh, respondent No.1 but since his initial appointment he has been continuously rendering his services in the Department of Himurja, respondent No.2. Needless to say, all the administrative action including appointments in tribal areas are usually made/done by the Resident Commissioner of the area and as such, respondent No.2, in whose direct control petitioner has been regularly working for the last more than 16 years, cannot be allowed to defeat the claim of the petitioner on the ground that since he was appointed by respondent No.1, his case is required to be considered by respondent No.1 for regularization. As per own reply filed by respondent No.2, petitioner had been regularly working in their department since the year, 2004 and during this period he has also completed 240 days in each calendar year. Though, respondent No.2 has made an attempt to make out a case that salary of the petitioner is/was being paid out of tribal funds but such plea of respondent No.2 deserves outright rejection being contrary to communication dated 14.11.2017(Annexure R-1) annexed with the reply filed by respondent No.1, sent by Project Officer (Himurja) Pangi at Killar, District Chamba, H.P., which is reproduced herein below:-

"To

The Resident Commissioner,
Pangi at Killar.

Dated: 14.11.2017

Subject: Regarding payment of wages in respect of Shri Gurbachan Singh, Daily wager at MHEP Sach pangi.

Sir,

As per your office telephonic direction on the subject cited above, it is submitted that as per record maintained in this office Shri Gurbachan Singh, daily wager is working at MHEP Sach Pangi on muster roll basis since February, 2004. The payment of wages is being made to him by this office on the receipt of budget from Directorate (Himurja) HP Shimla from time to time.

Yours faithfully

Project Officer(Himurja)
Pangi at Killar,
District Chamba, H.P."

6. Perusal of aforesaid communication clearly reveals that respondent No.2 besides maintaining the record of the services rendered by the petitioner has been also paying his salary on the receipt of budget from Directorate (Himurja), HP Shimla from time to time. Otherwise also, reply filed by respondent No.2, if perused in its entirety nowhere suggests that it has specifically denied the claim of the petitioner rather attempt has been made to shift the liability by stating that on account of financial crunch and non-availability of post, services of the petitioner cannot be regularized. However, since it stands duly established on record that petitioner from the date of his initial engagement has been continuously rendering service with the HIMURJA department without there being any break, respondent No.2 being his employer is under obligation to consider the case of the petitioner for regularization from the date when he has completed eight years regular service.

7. It is not in dispute that respondent-State with a view to mitigate the hardships usually faced by daily wage worker and to remove the unfair labour practices has issued policies for regularization of daily wage employee from time to time. The Division Bench of this Court vide judgment dated 28th July, 2010 in case titled Rakesh Kumar versus State of H.P. and others alongwith other connected matters, passed in CWP No.2735 of 2010 having taken note of policies of Government for regularization, has held as under:-

> 2. The only reference to be made for analyzing the grievance of the petitioners is two orders of the Government. One order is dated 3.4.2000 and other is dated 6.5.2000. Order dated 3.4.2000, reads as follows:
>
> > "In partial modification of this Department letter of even number dated 8th July, 1999 on the above subject, I am directed to say that the Government has now decided that the Daily Waged/Contingent Paid workers in all the Departments including Public Works and Irrigation and Public Health Departments (other than work-charged categories) /Boards/Corporations/Universities, etc. who have completed 8 years of continuous service (with a minimum of 240 days in a calendar year) as on 31-03-2000 will be eligible for regularization. It has further been decided that completion of required years of service makes such daily wager/contingent paid worker eligible for consideration to be regularized and regularization in all cases will be from prospective effect i.e. from the date the order of regularization is issued after completion of codal formalities.

2. In view of the above decision and in order to avoid any litigation and also any hardship to daily wagers departments shall do the regularization based on seniority and they will ensure that senior persons are regularized first rather than regularizing junior persons first.

3. Other terms and conditions like fulfillment of essential qualification as prescribed in R&P Rules, etc. etc. as laid down in this department letter of 8th July, 1999, as referred to above, shall continue to be operative.

4. These instructions may kindly be brought to the notice of all concerned for strict compliance.

5. These instructions have been issued with the prior approval of the Finance Department obtained vide their Dy. No. 852 dated 23-03-2000."

3. Order dated 6.5.2000, to the extent relevant, reads as follows:

"2. During the process of regularization of daily wagers, various issues and problems relating to these workers concerning their regularization have been brought to the notice of the Government. The Government in order to avoid such confusion or problems has decided to streamline the existing procedure/instructions in order to bring uniformity of procedure in various Departments of the Government. It has, therefore, been decided that henceforth:

(i) Daily Waged/Contingent Paid Workers who have completed required years of continuous service (with a minimum of 240 days in a calendar year except where specified other wise for the tribal areas) which as per latest instructions issued vide this Department letter of even number dated 3-4-2000 is 8 years as on 31-03-2000 shall be eligible for regularization. However, in Departments/Corporations/Boards, where the system of the work charge categories also exists, eligible daily wagers will be considered first for bringing them on the work charge category instead of regularization. Such eligible daily waged workers/contingent paid workers will be considered for regularization against vacant posts or by creation of fresh posts and in both these events prior approval of Finance Department will be required as per their letter No. Fin-1-C(7)-1/99 dated 24-12-1999. The terms and conditions for such regularization shall be governed as per Annexure –'A'."

4. This scheme was in force till a new scheme introduced on 9th June, 2006. The contention of the petitioners is that on completion of 8 years service, as per the scheme extracted above, they are liable to be granted the work-charged status being on a work charged establishment."

8. It is quite apparent from aforesaid law laid down by Division Bench of this Court, which has otherwise attained finality that daily wage employee, who has completed eight

years of continuous service (with a minimum of 240 days in a calendar year) shall be eligible for regularization.

9. Subsequent to passing of aforesaid judgment, Co-ordinate Bench of this Court in CWP No. 2415 of 2012, titled ***Mathu Ram vs. Municipal Corporation and others***, decided on 31.7.2014, while placing reliance upon aforesaid judgments rendered by Division Bench of this Court in Rakesh Kumar case supra, has held as under:-

> 5. It cannot be disputed that the policy of regularisation has been extended from time to time. The mere fact that there was a time gap in issuance of the policy of regularisation which prescribed different cut off dates cannot be a ground to deny the benefit of regularisation to the petitioner on his completion of 8 years of service on daily waged basis in terms of Rakesh Kumar (supra).
> 6. Accordingly, the petition is allowed and the respondents are directed to comply with the directions as issued in Rakesh Kumar's case (supra), however, subject to the final outcome of the SLP titled State vs. Rakesh Kumar, which is pending adjudication before the Hon'ble Apex Court.

10. Besides above, petitioner has also prayed for grant of work charge status from the date he has completed eight years service. Division Bench of this Court in Rakesh Kumar's case (supra) has held that the scheme announced by the Government clearly provides that the department concerned should consider the workmen concerned for bringing them on the work charge category and as such, there is obligation cast on the department to consider the case of the daily wage workmen for conferment of the work charged status, being a work charged establishment, on completion of the requisite number of years in terms of the policy.

11. This Court in Rakesh Kumar (supra) has held as under:

> "6. The simple question is whether the delay defeats justice? In analyzing the above issue, it has to be borne in mind that the petitioners are only class-IV workers (Beldars). The schemes announced by the Government clearly provided that the department concerned should consider the workmen concerned for bringing them on the work-charged category. So, there is an obligation cast on the department to consider the cases of the daily waged workmen for conferment of the work-charged status, being on a work-charged establishment, on completion of the required number of years in terms of the policy. At the best, the petitioners can only be denied the interest on the eligible benefits and not the benefits as such, which accrued on them as per the policy and under which policy, the department was bound to confer the status, subject to the workmen satisfying the required conditions."

12. Subsequently, the Division Bench of this Court vide judgment dated 10.5.2018 passed in ***CWP No. 3111 of 2016,*** titled ***State of HP and Ors. v. Ashwani Kumar,*** has categorically held that work charge establishment is not a pre-requisite for conferment of work charge status. Besides above, in the aforesaid judgment, Division Bench of this Court has

specifically observed that while deciding the issue, it is to be borne in mind that the petitioners are only class-IV workers i.e. Beldars and the schemes announced by the Government, clearly provides that the department concerned should consider the workmen concerned for bringing them on the work charged establishment and as such, there is an obligation cast upon the department to consider the case of daily waged workman for conferment of work charge status, on completion of requisite number of years in terms of the policy. Otherwise also, issue in question stands settled in CWP No. 4489 of 2009, titled ***Ravi Kumar v. State of H.P. and Ors***, decided on 14.12.2009, which has been further upheld by the Hon'ble Apex Court in Special Leave to appeal (C) No. 33570//2010 titled ***State of HP and Ors. v. Pritam Singh and connected matters***. Apart from above, decision rendered by this Court in CWP No. 3301/2016, ***Narotam Singh v. HPSEBL and Ors*** is also based upon the decision rendered by the Hon'ble Apex Court in ***Bhagwati Prasad v. Delhi State Mineral Development Corporation*** (1990) 1 SCC 361, as well as judgment rendered by this Court in CWP No. 9970 of 2012 titled ***Laxmi Devi v. State of H.P. and Ors***. Leaving everything aside, aforesaid judgment rendered by this Court in ***Ashwani Kumar's*** case (supra) has been upheld by the Hon'ble Apex Court.

13. Consequently, in view of the above, present petition is allowed and respondent No.2 is directed to grant work charge status to the petitioner from the date he had completed eight years of continuous service in the department and thereafter regularize his services in terms of the policy framed by the Government alongwith consequential benefits. In the aforesaid terms, present petition stands disposed of, so also pending applications, if any.

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

Baldev Raj ....Petitioner

Versus

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

CWPOA No.6061 of 2020
Date of decision: 24.9.2020

Constitution of India, 1950:- Article 226-Petitioner engaged as Beldar as rendered continuously his services in Herbal garden- His service illegally let trenched – On Reference under section 10(10 of Industrial Dispute Act- Ld. Labour Court held that act of respondent giving fictional break to workmen is illegal and against statue- Petitioner shall be entitled to continuity of service from the date of his engagement- Award ground of delay- Before these judgment- Petitioner stands regularized but not from due date- Claim of petitioner he should have been regularized when he completed 8 years of length service-Held, Once tribunal held him entitled to continuity in service from the date of his initial appointment – He was entitled for regularized on completion of 8 years regular service- The case of petitioner could not be

considered in light of clarification /opinion if any issued by elite of finance that there is no provision for regularize from back date.

For the Petitioner: Mr. A.K.Gupta, Advocate, through video-conferencing

For the Respondents: Mr. Arvind Sharma, Additional Advocate General, through video-conferencing.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge(Oral)**:**

Briefly stated facts, as emerge from the record are that initially petitioner was engaged in the respondent-Department as workmen/beldar and in this capacity, he continuously rendered his services in Herbal Garden Jogindernagar, District Mandi, H.P., but since his services came to be illegally retrenched alongwith other similarly situate persons, he alongwith other affected persons raised industrial dispute. Since, conciliation, interse parties failed, appropriate Government while exercising power under Section 10(1) of the Industrial Dispute Act, 1947 made following reference to the Labour Court-cum-Industrial Tribunal for adjudication:-

> " Whether the action of the Director, Ayurveda, H.P.Shimla-9(2) the Project Officer(Medicinal Plants), Research Institute in ISM, Jogindernagar, District Mandi, H.P. to give break in service to Sh.Bhumi Singh son of Sh. Tara Chand, Shri Sansar Singh S/o Himal Singh, Sh. Sarwan Kumar S/o Sh. Rattan Chand, Sh. Hem Singh S/o Sh. Bhargu Ram, Shri Som Nath s/o Sh. Bhagatu, Smt. Shakuntla Devi w/o Shri Kahan Singh, Smt. Bhagwati Devi w/o Shri Nagand and Sh. Deepak S/o Kanahiya workmen from time to time w.e.f. year 1999 and year 2000 during their service period without complying the provisions of the Industrial Dispute Act, 1947 is proper and justified? If not, what relief of break period and service benefits the above aggrieved workmen are entitled to?".

2. Learned Labour Court-cum-Industrial Tribunal, Dharamshala having perused the material adduced on record by the respective parties decided the reference in favour of the petitioner and other workmen, who had raised dispute before Industrial Tribunal vide award dated 28.8.2010 and passed following orders:-

> " For all the aforesaid reasons discussed above it was to be held that the respondents had been given fictional breaks to the workmen. The said act of the respondents is totally illegal and against the statutory provisions of the Industrial Dispute Act. Consequently, the respondent is directed not to give any fictional breaks to the aforesaid workmen in the future. They shall be entitled to continuity of services from the date of their respective engagement. They shall however not be entitled to any pecuniary benefits for the said period."

3. Respondent-Department being aggrieved and dissatisfied with the aforesaid award dated 28.8.2010 passed by the Labour Court-cum-Industrial Tribunal, approached this

court by way of CWP No.299 of 2011, titled ***as Director Ayurveda, Himachal Pradesh and another vs. The General Secretary Ayurveda Plants Production/Collection Employees Association, Herbal Garden Jogindernagar, District Mandi, H.P.,*** however, facts remains that aforesaid writ petition was dismissed vide judgment dated 1.3.2012, whereafter respondent-Department preferred Review Petition No.45/2013, but same was also dismissed vide judgment dated 23.7.2013.

4. Against the aforesaid judgment passed by the Division Bench of this Court in main matter as well as Review Petition, respondent-Department preferred SLP(C) No.3750-3751/2016, before the Hon'ble Apex Court, but same was also dismissed on the ground of inordinate delay of 1353 days in filing the SLP.

5. Vide impugned award dated 28.8.2010, which otherwise has attained finality, Tribunal below while directing the respondent not to give fictional breaks to the petitioner as well as other similarly situate persons, specifically ordered that petitioner as well as other similarly situate persons, who had approached Tribunal, shall be entitled to continuity of service from the date of their respective engagement, however they shall not be entitled to any pecuniary benefits for the said period.

6. Now, precise case of the petitioner is that though after passing of aforesaid judgments, he stands regularized but not from the due date. As per the petitioner, since he was appointed on 15.11.1991, his services should have been regularized on 14.11.1999 when he completed eight years regular service. But, since in the case at hand services of the petitioner came to be regularized against the post of beldar vide Office order dated 21.4.2012, petitioner was compelled to approach learned erstwhile H.P. Administrative Tribunal by way of OA No.879 of 2018, which now stands transferred to this Court and re-registered as CWPOA No.6061 of 2020, praying therein following reliefs:-

> "(i) That the respondents may be ordered to regularize the services of the applicant and others from the due dates i.e. from 8 years with all benefits incidental thereof".

7. Having heard learned counsel representing the parties and perused the material available on record, this Court finds sufficient force in the submissions made by learned counsel representing the petitioner that once Tribunal below vide award dated 28.8.2010 held him entitled to continuity in service from the date of his initial appointment i.e. 15.11.1991, he was entitled for regularization w.e.f.14.11.199, when he had completed eight years regular service.

8. Though, learned Additional Advocate General made an attempt to persuade this Court to agree with his contention that since during the aforesaid period petitioner never

completed 240 days in a calendar year, he cannot be given benefit of service, if any, rendered by him during 15.11.1991 to 14.11.1999, but such plea made by him deserves outright rejection because of specific findings returned by learned Labour Court-cum-Industrial Tribunal in its award dated 28.8.2010, whereby Tribunal below while directing the respondent not to give fictional breaks, categorically held that the petitioner would be entitled to continuity of service from the date of his engagement. Aforesaid award rendered by Labour Court-cum-Industrial Tribunal has attained finality up to the Hon'ble Apex Court and as such, it is not open at this stage for the respondent-Department to rake up the issue with regard to non-working of petitioner during 15.11.1991 to 14.11.1999, rather it is under obligation to regularize the services of the petitioner w.e.f. 14.11.1999 taking into consideration his date of initial engagement i.e.15.11.1991.

9. Careful perusal of communication dated Nil (Annexure A-1) issued from the office of Incharge, Research Institute in ISM, Jogindernagar, District Mandi, H.P., reveals that case of the petitioner alongwith other similarly situate persons was duly recommended for regularization w.e.f.14.11.1999 when he had completed eight years regular service. In the aforesaid communication Incharge, Research Institute ISM, Jogindernagar, District Mandi, H.P., has categorically held that on account of dismissal of SLP filed by the respondent-Department petitioner and other similarly situate persons are liable to be regularized from the date when they have completed eight years regular service, but it appears that aforesaid recommendation made by Incharge, Research Institute in ISM, Jogindernagar, District Mandi, H.P. has not been paid any heed by the authority concerned.

10. Perusal of order dated 16.2.2019 passed by Director Ayurveda, Himachal Pradesh (Annexure R-IV) in purported compliance of the directions issued by the various courts in the case of the petitioner and other similarly situate persons, suggests that case of the petitioner for regularization w.e.f. 14.11.1999 i.e. when he had completed eight years regular services, has been rejected on very flimsy ground. In the aforesaid order, no specific cogent and convincing reasons has been assigned by the Director while rejecting the claim of the petitioner for regularization from the date when he had completed eight years services, rather reliance has been placed upon the communication dated 10.10.2014, issued by the Department of Finance, wherein it has been opined/re-affirmed that there is no provision for regularization from back date. Reasons assigned in the aforesaid order passed by the Director Ayurveda deserves outright rejection being wholly untenable because case of the petitioner could not be considered/decided in light of the clarification/opinion if any, issued by the Department of Finance, especially in view of the specific findings returned by the various courts of law.

11. True, it is that one cannot claim regularization from the date of his initial engagement but definitely he/she is entitled for regularization from the date when he /she completed required period of 8/10 years, as provided under the various policies framed by the Government of H.P. for regularization of such employees. Since, there is no dispute that petitioner has already completed eight years regular service, he cannot be denied such benefit on the ground that there is no provision for regularization from back date. Otherwise also, in the case at hand petitioner is not claiming regularization from the back date, rather he has claimed regularization from the date when he had completed eight years regular service from the date of his initial appointment which claim of his is otherwise cannot be rejected, especially when it stands duly provided in the policy framed by the Government from time to time that workmen/daily wage employee shall be entitled for regularization after completion of 8/10 years regular service. Since, now in the case at hand it is not open for the respondent to claim that petitioner did not render eight years regular service between 15.11.1991 to 14.11.1999 because of specific findings returned by the Industrial Tribunal in its award dated 28.8.2010, petitioner is entitled for regularization w.e.f.14.11.1999.

12. Consequently, in view of the above, this Court finds merit in the present petition and accordingly same is allowed. The order dated 16.2.2019, passed by the Director Ayurveda (Annexure R-IV) is quashed and set-aside. The Director Ayurveda is directed to regularize the services of the petitioner w.e.f.14.11.1999, but since petitioner has not been held entitled for back wages by the Tribunal below, he shall not be entitled for back wages. Pending applications, if any, also stand disposed of.

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

Oriental Insurance Company Limited ....Appellant.

Versus

Prem Kumar & others ... Respondents.

FAO (ECA) No.45 of 2020
Decided on: 21.09.2020

Employees Compensation Act, 1923- Appeal under section 30 of Act- Validity of driving licence- Information recovered under RTI Act from District Transport Officer- --- No record has been found in respect of driving licence- This report can not be construed to be proof of fact that driving licence was not a valid or was a fake licence – The person to whom information was supplied does not enter into witness box- What information was sought by him from office of PIO- DTO is not on record- Simply because it was not expressly mentioned in trespasses that owner of vehicle had engaged the deceased as his driver after verifying his licence does not mean that it has to be assumed against either the claimed or owner of vehicle- The contents of

response to claim petitioner how to be continued harmonious with contents of clean petition itself- There is averment in the affidavit of owner that he had checked the driving licence and same was found valid- There was no cross examination on the – insurance company- It can not be held that ld---relied upon evidence contrary to pleading.

For the appellant : Mr. Jagdish Thakur, Advocate.

For the respondents : M/s Abhishek Sood and Pavinder Thakur, Advocates, for respondents No.1 and 2.

Mr. Rajiv Rai, Advocate, for respondent No.3.
(Through Video Conferencing).

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

By way of this appeal, filed under Section 30 of the Employee's Compensation Act, the appellant/Insurance Company has challenged the order passed by Commissioner, Employee's Compensation, Solan, District Solan, H.P., in WCA No.7/2 of 2015, titled as Prem Kumar & another Versus Sanjeev Kumar & another, decided on 26.07.2019, vide which order, learned Commissioner awarded an amount of Rs.8,85,480/- alongwith interest @ 12% per annum w.e.f. 24.09.2014, one month after the death of deceased, in favour of the claimants therein.

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

Respondents No.1 and 2 in the present appeal (hereinafter referred to as the claim petitioners) filed a petition under Section 22 of the Employee's Compensation Act, *inter alia*, on the ground that they were the parents of Dheeraj Kumar, who was engaged by Sanjay Kumar as a driver with his truck bearing registration No.HP-11-6943. His salary was Rs.10,000/- per month, which excluded over time. On 24.08.2014, the vehicle being driven by Dheeraj Kumar met with an accident and as a result of grievous injuries which were sustained by Dheeraj Kumar in the said accident, which occurred in the course of his employment, near Bagi, Narkanda, Tehsil Nankhadi, District Shimla, H.P., he lost his life. The claimants prayed for compensation to the tune of Rs.10,00,000/-, *inter alia*, on the ground that the claimants were dependants upon the deceased whose age at the time of death was only twenty two years.

3. Petition was resisted by the owner of the vehicle (Sanjay Kumar), *inter alia*, on the ground that as the truck was duly insured, it was the Insurance Company, which was liable to compensate the claimants. The factum of the truck being owned by him which was being driven by the deceased and further the factum of the deceased being engaged by him as a driver upon the said truck on monthly salary of Rs.10,000/- was admitted by him. As per the owner, truck in issue was duly insured with the Oriental Insurance Company, vide Insurance Policy No.263197/31/2015/83, valid from 02.05.2014 to 01.05.2015.

4. The Insurance Company resisted the claim petition, *inter alia*, on the ground that the truck was not insured with it and further that deceased was not having a valid Driving Licence to drive the vehicle in issue. It was further the stand of the Insurance Company that the truck was deliberately handed over for being driven to a person who did not possess a valid licence and thus, the conditions of the policy stood violated and the truck was not having required permit also.

5. On the basis of the pleadings of the parties, learned Commissioner framed the following issues:-

> "1. Whether the respondent No.1 had employed late Sh. Dheeraj Kumar as driver in his truck bearing No.HP-11-6943, as alleged? OPP
>
> 2. Whether late Sh. Dheeraj Kumar met with an accident on 24.8.2014 and died during the course of his employment with respondent No.1, as alleged? OPP.
>
> 3. Whether the petitioners are entitled for compensation as prayed for? OPP
>
> 4. Whether the deceased Dheeraj Kumar was not holding valid and effecting driving licence at the time of accident, as alleged? OPR-2
>
> 5. Whether the truck in question was not only duly registered and it was not having required permit at the time of accident and could not be plied in public place, as alleged? OPR-2.
>
> 6. Relief."

6. On the basis of evidence led by the parties in support of their respective contentions, learned Commissioner returned the following findings on the issues so framed:-

> "Issue No.1 : Yes.
>
> Issue No.2 : Yes.
>
> Issue No.3 : Yes.
>
> Issue No.4 : No.
>
> Issue No.5 : No.
>
> Relief : The petition of the petitioners is allowed, per operative of the order."

7. Claim petition was, thus, allowed by learned Commissioner by holding the claimants to be entitled for compensation of Rs. 8,85,480/- alongwith interest @ 12% per annum w.e.f. 24.09.2014, i.e. one month after the death of deceased (Dheeraj Kumar) in accident till deposit of the amount. While holding that the claimants were entitled for compensation to the tune of Rs.8,85,480/-, learned Commissioner held that the deemed monthly wages of the workman came to Rs.8,000/- and that it stood proved on record that the claimants were dependants upon their deceased son. Learned Commissioner also held that admittedly the age of the deceased at the time of death was twenty two years and as the employer had not denied the fact of deceased being paid wages of Rs.10,000/- per month, then on the strength of reasoning assigned in para 28 onwards of the order, learned Commissioner took the deemed monthly wages of the workman to be Rs.8,000/-. The compensation was assessed by taking 50% of the deemed income i.e. Rs.4,000/- and multiplying it by R Factor i.e. 221.37.

8. Feeling aggrieved, the Insurance Company has filed the present appeal.

9. This appeal was admitted on 28.02.2020, on the following substantial questions of law:-

> "1. Whether the appellant is liable to pay the compensation when the driving licence of the deceased driver was found not issued by the concerned DTO which means that licence was fake that too when the same has been proved by the appellant by leading cogent evidence?
>
> 2. Whether the report qua driving licence obtained under RTI from the concerned District Transport Officer require corroboration as per Section 77 of the Evidence Act?
>
> 3. Whether the learned Commissioner is right in relying upon the evidence led contrary to the pleading as the owner has not stated a single word in his reply that prior to engaging the driver has had checked and verified the driving licence of the deceased driver?

10. I have heard learned counsel for the parties and have gone through the orders passed by learned Commissioner as well as record of the case.

11. A perusal of the record of the case demonstrates that in order to prove their case, claimant Prem Kumar stepped into the witness box as PW-1 and he submitted his affidavit by way of evidence which is on record as Ext.PW1/A. It was stated in this affidavit that

the deceased son of the petitioner was engaged as a driver by the owner of the vehicle bearing Registration No.HP-11-6943 and that his per month salary was Rs.10,000/-, out of which he used to hand over an amount of Rs.8,000/- to the claimants for household expenses. It was further mentioned in the affidavit that the son of the claimants died in an accident, on 24.08.2014, in the course of his duty, in which accident he had received fatal injuries. The cross-examination of this witness demonstrates that there was no question put to him by the present appellant that the son of the claimants was not possessing a valid driving licence.

12. The owner of the vehicle (Sanjay Kumar) entered into the witness box as RW-1. He submitted his affidavit by way of evidence, which is on record as Ext.RW1/A. A perusal of this affidavit demonstrates that the owner of the vehicle had mentioned therein that he was owner of the vehicle bearing Registration No.HP-11-6943, which was duly insured with the appellant/Oriental Insurance Company Limited and the insurance was valid from 02.05.2014 to 01.05.2015. He further mentioned in the affidavit that he had engaged the deceased as driver upon the said vehicle in the month of May, 2014, on monthly wages of Rs.10,000/-. In para 3 of this affidavit, it stood mentioned that the owner had duly seen and checked the driving licence of the deceased before he was engaged by him as driver upon his vehicle. The factum of the deceased having died in the course of employment is also borne out from the contents of this affidavit.

13. Record further demonstrates that on behalf of the Insurance Company, Smt. Tamanna, entered the witness box as RW-3, who was serving as Manager (Legal) in the Divisional Office of the Insurance Company at Shimla. She deposed in the Court that the Insurance Company had undertaken an investigation through one Shri Pritam Singh Chandel with regard to validity of the licence of the deceased and in the course of investigation, the information which was supplied to them was Mark 'C', in terms whereof, the deceased was not possessing a valid driving licence and thus the conditions of the Insurance Policy stood violated.

14. Before this Court deals with Mark 'C', it is apt to mention at this stage itself that in the course of cross-examination of the owner of the vehicle by the Insurance Company, no suggestion was put to the owner by the Insurance Company that at the time of engaging the deceased as his driver, he had not checked the driving licence of the deceased.

15. Now, in this background, while answering the issue framed that the deceased Dheeraj Kumar was not holding a valid and effecting driving licence at the time when the accident took place, learned Commissioner held that this plea stood belied by the statements of

RW-1 and RW-2, who had clearly stated that they had checked the licence of the deceased. RW-2 was earlier employer of the deceased driver. Learned Commissioner further held that RW-3 had clearly admitted in the course of her cross-examination that she had not seen the letter which was issued to Shri Pritam Singh Chandel for the purpose of verification of the driving licence. Learned Commissioner further held that the contents of Mark 'C' otherwise also did not *per se* led to the conclusion the driving licence possessed by the deceased was invalid.

16. In my considered view, the findings so returned by learned Commissioner are apt findings based upon the evidence on record and it cannot be said that it stood proved on record that the driving licence possessed by the deceased was either a fake licence or that learned Commissioner relied upon the evidence, led contrary to the pleadings. As it was the case of the Insurance Company that the licence possessed by the deceased was a fake licence, onus was upon it to prove this allegation. Record of the case demonstrates that the Insurance Company miserably failed to prove this fact before learned Commissioner. No evidence was led by the Insurance Company to demonstrate that the licence of the deceased was a fake licence.

17. Mark 'C', which is the communication issued by the Office of PIO & District Transport Officer, Tuensang, Nagaland, reads as under:-

> "With reference to the subject cited above, this is to inform you that no record has been found/available in respect of Driving Licence No.44458/TV/T/2010 in the name of Shri Dhiraj Kumar in the office of the undersigned".

A perusal of the information which stood supplied through Mark 'C' nowhere can be construed to be a proof of the fact that the licence possessed by the deceased was not a valid licence or was a fake licence. All that this communication states is that no record was found/available in this fact of the driving licence of Dheeraj Kumar in the office of the undersigned. This information was supplied to one Shri Pritam Singh Chandel, who did not enter the witness box. What information was sought by Shri Pritam Singh Chandel under Right to Information Act from the Office of PIO & District Transport Officer, Tuensang, Nagaland, is not on record. Therefore, in these circumstances, a simple response to Shri Pritam Singh Chandel, vide Mark 'C' that no record has been found/available in respect of the driving licence in issue, cannot be construed to be a proof of the fact that the licence possessed by Dheeraj Kumar i.e. the deceased driving, was a fake licence. The findings which have been returned in this regard by learned Commissioner in para 33 of the order, therefore, cannot be said to be perverse findings nor it can be said that the appellant had proved before learned Commissioner the fact that the licence possessed by the deceased was a fake licence.

18. Coming to the provisions of Section 77 of the Indian Evidence Act, all that this Court can observe is that Section 77 of the Indian Evidence Act provides that such certified copies may be produced in proof of the contents of the public documents or parts of the public documents, of which they purport to be the copies. It is not understood as to how Section 77 of the Evidence Act comes to the rescue of the present appellant to demonstrate and prove on the basis of contents of Mark 'C' that the driving licence possessed by the deceased was a fake licence. In other words, in view of the provisions of Section 77 of the Indian Evidence Act, this Court is not discarding Mark 'C' nor has the same being discarded by learned Commissioner, but it is reiterated that contents of Mark 'C' do not prove that the driving licence possessed by the deceased was a fake licence.

19. Similarly, from the record it cannot be said that learned Commissioner relied upon evidence led contrary to the pleadings. In the reply which was filed by the owner of the vehicle to the claim petition, nowhere it stands mentioned by the owner of the vehicle that he had not verified the licence of the deceased at the time when he engaged him as a driver. In my considered view, simply because it was not expressly mentioned in the response that the owner of the vehicle had engaged the deceased as his driver after verifying his licence, same does not means that this fact has to be assumed against either the claimants or the owner of the vehicle. This, I say for the reason that it has to be appreciated and understood that the contents of the response filed to the claim petition by respondent No.1, have to be construed harmoniously with the contents of the claim petition itself, which were being responded to by way of response.

20. Incidently, in the affidavit which was filed by way of evidence by the owner of the vehicle, in para 3 thereof, he clearly and categorically stated that he had checked the licence of the driver before he engaged him, which he found to be valid. As already mentioned hereinabove also, there was no cross-examination on this point by the Insurance Company and no suggestion was put to the owner of the vehicle by the Insurance Company that the owner did not verify the licence of the driver at the time of his engagement. Therefore, it cannot be said that learned Commissioner relied upon the evidence contrary to the pleadings while deciding the claim petition. Substantial questions of law are answered accordingly.

21. In view of the findings so returned hereinabove, as this Court does not finds any merit in the present appeal, the same is dismissed, so also pending miscellaneous application(s), if any. Interim order, if any, also stands vacated. No order as to costs.

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

Ajay Singh ....Petitioner.

Versus

Deputy Commissioner-cum-Chairman
Local Area Development Committee
& others ... Respondents.

CWPOA No.6680 of 2019
Decided on: 05.11.2020

Constitution of India, 1950:- Article 226- Petition challenging the termination order- Held, though the engagement of the petitioner wsa on temporary basis yet his services could not have been terminated on the basis of verbal directions given by Deputy Commissioner Kullu, In case, services of the petitioner were no more required for only cogent reason then termination ---to have been justified by passing a recorded order after--- the petitioner.

For the petitioner : Mr. L.N. Sharma, Advocate.

For the respondents : Mr. Dinesh Thakur, Additional Advocate General, with Ms. Divya Sood, Deputy Advocate General.
(Through Video Conferencing).

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

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

> "(1) that the impugned termination order dated 16.2.2016 (A-6) issued by the respondent No.3 may kindly be quashed and set aside.
> (2) That the directions may kindly be issued to the respondents to take back the services of the applicant as Junior Engineer (Civil) immediately.
> (3) That the respondents may kindly be directed to pay the monthly honorarium of Rs.15,000/- per month w.e.f. 1.9.2015 to 15.2.2016 along with a sum of Rs.3,529 as outstanding T.A. claim of the applicant forthwith".

2. The controversy involved in this petition is in a very narrow compass. The petitioner was engaged as a Junior Engineer (LADC), on temporary basis, vide communication dated 28.08.2015. His services were terminated, vide order dated 16.02.2016 (Annexure A-6), which reads as under:-

> "In compliance of the verbal direction given by worthy Deputy Commissioner, Kullu and further conveyed by the Block Development Officer, Banjar on dated 15.02.2016, the service of Ajay Singh and Narender Singh Junior Engineers (LADF) (appointed on temporary basis vide Order Endst. No.264/SDK dated 28.08.2015) are hereby terminated with immediate effect. The above said JEs are directed to handover all the relevant record to Block Development Officer, Banjar after completing all codal formalities".

3. Feeling aggrieved, the petitioner approached the learned erstwhile Himachal Pradesh Administrative Tribunal, praying for the reliefs already enumerated hereinabove.

4. On account of the interim direction which stood passed by the learned Tribunal on 16.03.2016, the petitioner is stated to be in service. Post abolition of the learned Tribunal, the Original Application stands transferred to this Court.

5. Having heard learned counsel for the parties and having gone through the petition as well as reply and documents appended therewith, in my considered view, impugned order dated 16.02.2016 is not sustainable in the eyes of law. Though the engagement of the petitioner undisputedly was on temporary basis, yet, his services could not have been terminated on the basis of a verbal direction given by Deputy Commissioner, Kullu, District Kullu, H.P., as is borne out from the contents of the impugned order. In case, the services of the petitioner were no more required for any cogent reason, then the termination ought to have been justified by passing a reasoned order after hearing the petitioner and the same could not have been done on the basis of the verbal direction of Deputy Commissioner. On this short count, present petition succeeds and order dated 16.02.2016 is quashed and set aside. The respondents are further directed not to dispense with the services of the petitioner except in accordance with law.

6. At this stage, learned counsel for the petitioner informs the Court that the petitioner has not been paid wages for the period for which he has worked with the respondents on the basis of the interim direction passed by the learned Tribunal. As the operation of impugned order stood stayed by the learned Tribunal on 16.03.2016 and record demonstrates that this order was not altered or modified, then in my considered view, the respondents have to pay the wages/remuneration etc. to the petitioner, till the time he continues to serve them. Accordingly, the respondents are directed to pay the remuneration including arrears to the petitioner, till he is in the service of the respondents. The stands disposed of, so also pending miscellaneous applications if any.

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

Raj Kumar ....Petitioner

Versus

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

CWPOA No. 2700 of 2019
Date of decision: 08.10.2020

Constitution of India, 1950:- Article 226- The petitioner- Engaged as JBT teacher on lecture basis-Remained absent willfully or intentionally from duty-His service were terminates Ld.

Administrative Tribunal set order the termination order- To consider the petitioner for appointment in terms of his qualification and experience- In any institute under the charges- Ld. Tribunal did not hold petitioner entitled for ----- Petitioner was given appointment- Petitioner superannuated- His service tendered before termination not taken into consideration for clarity petitioner- Order/ judgment of tribunal suggest that petitioner not entitle to --- wages but claim of petitioner count has service render before terminate while calculation, his entire service for determine- Question--- initial minimum educational qualification provisional for the different posts is undoubtedly a factor to be reckoned with ---

Cases referred:
Bhagwati Prasad versus Delhi State Mineral Development Corporation (1990)1 SCC 361;

For the Petitioner: Mr. Bhuvnesh Sharma, Advocate.

For the Respondents**:** Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocate Generals with Mr. Kunal Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge(Oral)**:**

(Through Video Conferencing)

The petitioner was engaged as JBT Teacher on tenure basis in the respondent-department vide order dated 27.7.1988. Since, petitioner remained absent willfully and unauthorizedly from duty with effect from May 1991 to July 13, 1992, his services were terminated w.e.f. May 9, 1991.

2. Being aggrieved with the aforesaid termination order dated 9th May, 1991, petitioner preferred Original Application bearing No. 211/93 before the erstwhile H.P. State Administrative Tribunal, but same was ordered to be treated as representation with the direction to Secretary (Education) to consider and decide the same. Secretary (Education) considered the representation and rejected the same and as such, petitioner was once again compelled to file Original Application bearing No. 1613/1993 before the erstwhile H.P. State Administrative Tribunal. On 27.02.2002, learned Tribunal having taken note of the fact that department failed to produce the appointment letter/record of the case despite repeated opportunities allowed the petition and set-aside the termination order of the petitioner. While passing aforesaid order, learned tribunal directed the respondents to consider the petitioner for appointment in terms of his qualifications and experience in any institution under their charge, however, while passing aforesaid direction in favour of the petitioner Tribunal below did not held him entitle to seniority or back wages(Annexure P-1).

3. Pursuant to aforesaid direction issued by learned Tribunal, respondent-department, vide order dated 18.9.2002 (Annexure P-2), reinstated the petitioner against the

post of JBT teacher on tenure basis in the pay scale of Rs. 4550-7220/- and posted him in Government Primary School, Jetehri Block Bangana, District Una, H.P., with condition that that he will be entitled for regularization after 10 years of service as JBT and non-duty period will not be counted towards qualifying service of 10 years. On 30th June, 2020, petitioner has superannuated, but since services rendered by him prior to his termination was not taken into consideration by respondent-department while calculating his services for the purpose of pension, he approached this Court by way of instant petition, praying therein following reliefs:-

i) That the respondents may be directed to regularize the services of the petitioner as JBT Teacher w.e.f. due date with all consequential benefits, in the interest of justice.

ii) That the petitioner may be held entitled for grant of regular pay-scale w.e.f. his initial date of appointment on tenure basis and the arrears accrued, may be ordered to be paid with interest.

4. Having heard learned counsel representing the parties and perused the pleadings adduced on record by the respective parties, this Court finds that there is no dispute interse parties that prior to issuance of order dated 17.09.2002, whereby, petitioner came to be re-instated in terms of the judgment dated 27.2.2002, passed by the erstwhile H.P. State Administrative Tribunal, petitioner had already worked as JBT on tenure basis w.e.f. 27.8.1988 to May, 1991 and in case aforesaid period is counted towards the total services rendered by the petitioner in the department, he would become entitled for pension as well as regularization in terms of the policy framed by the Govt. of Himachal Pradesh for regularization.

5. Respondents in their reply while admitting the aforesaid facts as have been taken note hereinabove, have stated that since petitioner was given fresh appointment in the year 2002 pursuant to judgment dated 27.02.2002, passed by Tribunal, no benefit, if any, can be claimed by him qua the services which he rendered in the department on tenure basis prior to his termination in the year 1991.

6. Mr. Arvind Sharma, learned Additional Advocate General, while inviting attention of this Court to judgment dated 27.2.2002, passed by the erstwhile H.P. State Administrative Tribunal (Annexure P-1), contends that since it stands recorded in the judgment that petitioner shall not be entitled for seniority or back-wages, he is not entitled to the reliefs as have been prayed in the instant petition. Besides above, Mr. Sharma further contends that otherwise also, petitioner could not be regularized because he did not possess the requisite qualification. He further contends that after the introduction of Right to Education Act and NCTE Guidelines, no untrained teacher can be appointed as JBT. He submits that as per the guidelines issued by the NCTE, minimum qualifications for a person to be eligible for

appointment as JBT Teacher is Senior Secondary (or its equivalent) with at least 50% marks and four years Bachelor of Elementary Education (B.E.I.ED) or Senior Secondary (or its equivalent) with at least 50% marks and two years Diploma in Elementary Education and pass in the teacher eligibility test (TET) to be conducted by the authority designated by the H.P.State Government.

7. However, having carefully perused the material available on record, especially reply filed by the respondents, this Court is not inclined to accept the aforesaid submission made by learned Additional Advocate General. Bare perusal of judgment dated 27.2.2002 (Annexure P-1), suggests that petitioner is/was not held entitled to seniority or back wages, but in the case at hand, petitioner has neither claimed seniority nor back-wages, rather his innocuous prayer is that services rendered by him in the year 2000 may be taken into consideration, while calculating his entire service for determining the qualifying service for the purpose of pension and regularization. Similarly, this Court finds from the judgment dated 27.2.2002 passed by learned tribunal below that respondents were directed to consider the petitioner for appointment in terms of his qualifications and experiences in any institution under their charge. In the aforesaid proceedings plea with regard to petitioner having no requisite qualifications never came to be raised and as such, learned Tribunal below directed the respondents to offer appointment to the petitioner in terms of his qualification and experience. Accordingly, respondents offered appointment to the petitioner against the post of JBT in the year, 2002, as has been fairly admitted by the respondents in the reply. It stands duly admitted in the reply that the petitioner was possessing degree in Art and Craft. Other candidates, who have been possessing said qualification stands appointed against the post of JBT as per decision of the Government and their services were regularized after 10 years of service and as such, presently they are working as regular JBT Teacher. Since, it clearly emerge from the reply filed by the respondents that JBT teacher with 10 years of service were awarded Special JBT Certificate for regularization of their services, similar treatment is required to be given to the petitioner, who admittedly worked for more than 10 years as JBT Teacher.

8. It is relevant to mention here that petitioner was ordered to be reinstated in the year 2002 by learned Tribunal having taken note of the fact that prior to his alleged termination petitioner had rendered regular services w.e.f. 27.7.1988 to May 1991 and if aforesaid period is counted towards total service of petitioner, he also deserves to be awarded Special JBT certificate after completion of 10 years service, so that his services are regularized as has been done in the case of the other similar situate persons. Moreover, issue with regard to eligibility, if any, in terms of R&P Rules cannot be raised in the case of the petitioner, who admittedly was given appointment by the respondents on the basis of qualification possessed by him initially in

the year, 1988 and thereafter 2002 on the basis of the judgment rendered by Tribunal below. 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.

9. In the aforesaid judgment, it has been categorically held that 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 petitioner was appointed as JBT and he was allowed to work for considerable length of time, it would be hard and harsh to deny him regularization /confirmation in the respective post on the ground that he lacks the prescribed educational qualification.

10. Besides above, respondents have stated in their reply that there is no service record available in the office of Deputy Director of Elementary Education, Una as well as in the concerned BEEO on the basis of which services rendered by the petitioner as JBT in Govt. Primary School, Guling, District Lahul & Spiti w.e.f. 27.07.1988 to May 1991 can be counted for qualifying service of 10 years, but such plea is wholly untenable for the reasons that factum with regard to

service rendered by the petitioner during aforesaid period as JBT at Government Primary School, Guling, District Lahul & Spiti and thereafter in District Una stands duly admitted in the reply filed by the respondents and as such, claim of the petitioner cannot be rejected on account of non-availability of record, which was/ is to be kept in safe custody by the respondents till the time same is weeded out in accordance with law after expiry of statutory retention period. It is none of the case of the respondents that record with regard to appointment of petitioner as JBT at Primary School, Guling, District Lahul & Spiti stands weeded out on account of expiry of statutory period of retention.

11. Consequently, in view of the above, present petition is allowed and services rendered by the petitioner w.e.f.27.7.1988 to May 1991 prior to his termination order, are ordered to be to be taken into consideration while calculating entire service of the petitioner for determining the qualifying service for the purpose of pension. Besides above, respondents are also directed to regularize the services of the petitioner from the date when he had completed 10 years complete service alongwith consequential benefits.

In the aforesaid terms, present petition is disposed of, so also, pending application(s), if any.

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

Ravi Dass .....Petitioner

Versus

Divisional Forest Officer .....Respondent

CWP No.2581 of 2013
Decided on: 13.10.2020

Constitution of India, 1950-Article 226 – Petitioner engages as daily wages on muster roll on 7.1.2005- Worked till 30.6.2009- Petitioner being given fixational breaks from time to time on his demand notice- Settlement 4/512(3) of Industrial Disputes Act Arrived between him and employer- Petitioner agreed to work anywhere as per seniority within while jurisdiction of Joginder Nagar forest division as per availability of work- It may be 8 km or more from his permanent residence – Will report for duty on 16.4.2009 as Chauntra- - Reengaged on 16.4.2009 – Worked continually up to 30.6.2009 without any break- Service terminated on 1.7.2009- Petitioner raised Industrial Dispute its conciliation failed- Appropriate Government made land reference to Labour court-cum- Industrial Tribunal- Whether termination of petitioner without complaining performance 25-F, 25-G- 25-G of Industrial dispute is justified- Tribunal decided the reference against the petitioner- Petitioner had done before Hon'ble High Court against the order of tribunal- Held, petitioner after his re-engagement on 16.4.2009 petitioner did not join duty despite notices- The contention record on behalf of petitioner- That petitioner during his employment on workmen was repeated given fictional break with a new to present him to compute 240 days in calendar year so that he can not claim regularization – Held, this place is no relevance in light of terms of reference as reference nowhere suggest that Tribunal was required to go in to the effect of the matter- The Tribunal can not go beyond the terms of reference- Hon'ble He has very limited jurisdiction to- appreciate finding of fact returned by tribunal while exercising writ jurisdiction.

Cases referred:
Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157;
Mukand Ltd. V. Mukand Staff & Officers' Assn (2004) 10 SCC 460;

For the Petitioner : Mr. Kulbhushan Khajuria, Advocate, through video-conferencing

For the Respondent : Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocate Generals, with Mr. Kunal Thakur, Deputy Advocate General, through video-conferencing.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Instant petition filed under Article 226 of the Constitution of India, lays challenge to award dated 14.1.2013 passed by the Presiding Judge, Labour Court-cum-Industrial Tribunal Kangra at Dharamshala ***(for short the "Tribunal")*** in reference No. 235/2010, whereby reference made to the Tribunal below has been decided against the petitioner ***(hereinafter referred to as the workman).***

2. For having bird's eye view, certain undisputed facts as emerge from the record are that the petitioner was initially engaged as daily wager on muster roll basis in the respondent-department on 7.1.2005. He continued to work in this capacity till 30.6.2009. Since the petitioner was being given fictional breaks from time to time, he on 12.4.2008 served demand notice upon the Conservator of Forests, Mandi Circle, copy whereof was also forwarded to the Labour-cum- Conciliation Officer, Mandi. On 17th March, 2009, a settlement under Section 12(3) of the Industrial Disputes Act, 1947 ***(for short "Act')*** came to be arrived interse parties. The terms of the settlement are as under:-

> "(1) The employer/management side has stated in written reply dated 13.05.2005 that Mr. Ravi Dass above worker has worked as beldar on daily wages for 85 and 118 days during 2005 and 2007 respectively. The seniority of all daily wagers is made at division level. The above worker can be been employed as per his seniority with the whole jurisdiction of Joginder Nagar Forest Division, as per availability of work. He will be retrenched as per provisions of Section 25-F and reemployed as per provisions of Section 25-G and 25-H of ibid Act.
>
> (2) Mr. Ravi Dass above worker agrees to work anywhere, as per his seniority, within the whole jurisdiction of Jogindernagar Forest Division, as per availability of work and it may be 8kms or more away from his permanent residence. He will report for duties on 16.04.2009 to the Block Forest Officer, Chauntra on 16.4.2009 at 9 AM.
>
> (3) Both the parties to the Industrial Disputes agree to above terms of settlement at Sr. No.1 and 2 therefore this Industrial Disputes has been finally disposed."

3. On the basis of aforesaid settlement, workman came to be re-engaged by the respondent on 16.4.2009, whereafter he worked continuously upto 30.6.2009 without any break, but allegedly on 1.7.2009 his services were again terminated by way of verbal orders and as such, he was compelled to raise Industrial Dispute. Since conciliation interse parties failed, appropriate Government under Section 10(1) of the Act made following reference to the Labour Court-cum-Industrial Tribunal, Dharamshala for adjudication:-

> **"Whether termination of the services of Sh. Ravi Dass S/o Sh. Hoshiyar Singh by the Divisional Forest Officer, Joginder Nagar, District Mandi, H.P. w.e.f.01.7.2009 without complying the provisions of Section 25-F, 25-G and 25-H of the Industrial Disputes Act, 1947, as alleged by the workman, is proper and justified? If not, what amount of compensation, back wages and other service benefits the above worker is entitled to from the above employer?"**

4. Workman before the learned Tribunal below set up a case that his services were initially engaged as a daily wager on muster roll basis in the respondent in the year, 2005 and in this capacity, he continuously served the department upto 30.6.2009. Workman claimed that during aforesaid period, respondent intentionally gave him fictional breaks so that he could not complete 240 days in a calendar year for the purpose of regularization. Workman also averred before the Tribunal below that in August, 2006 his services were illegally terminated and as such, he was compelled to serve demand notice upon the Conservator of Forests, Mandi, but he was reinstated on 16.4.2009 pursuant to the settlement arrived interse parties on 17.3.2009 under Section 12(3) of the Act. Workman averred that on 1.7.2009, his services have been illegally terminated by the respondent that too without adhering to the provisions contained under the Act. Workman specifically claimed that the respondents have failed to adhere the principle of "last come first go" because after his disengagement, new/fresh hands were engaged by the respondent and at no point of time he was given an opportunity of re-employment. Workman also claimed that termination of him deserves to be quashed and set aside being passed in violation of provisions contained under Sections 25-F, 25-G and 25-H of the Act.

5. Respondent by way of written statement refuted the aforesaid claim of the petitioner and claimed before the Tribunal below that though the petitioner was engaged in the month of July, 2005, but he was given work intermittently as per the availability of the work and funds in various seasonal forestry works. Respondent claimed that the workman never completed 240 days of work in any calendar year of his engagement and in the month of August 2006, he himself abandoned the job. Respondent claimed that on 16.4.2009 though workman was re-engaged pursuant to the settlement dated 17.3.2009, but he only worked up to 30.6.2009 and thereafter left the job voluntarily. Respondent also claimed that the workman did not respond to their notices dated 8.7.2009, 29.7.2009 and 18.12.2009 calling upon him to resume his duties. Apart from above, respondent also claimed that no artificial breaks were given to the petitioner, rather his services were engaged intermittently on account of various seasonal forestry works i.e. plantation and nursery etc in Joginder Nagar range. On the cessation of the season/work, respondent had no option but to disengage the services of the petitioner alongwith other similarly situate workmen. Respondent categorically stated before the Tribunal below that workman and other similarly situate workmen used to be reengaged as daily wagers with the start of the fresh season in the next year. Respondent categorically stated in their reply to the claim petition that petitioner, who is gainfully employed is/was not interested to work with them and as such, abandoned the job.

6. In rejoinder to the aforesaid reply filed by the respondent, workman pleaded that the mandays chart produced by the respondent is incorrect. He claimed that he worked on

bill voucher basis and has completed more than 240 days in each and every calendar year of his employment. While refuting claim of the respondent that he abandoned the job, workman claimed that no notice was ever received by him and person junior to him has been reappointed on muster roll basis by the respondent in the month of November, 2006.

7. On the basis of the pleadings of the parties, the following issues were framed:-

1. Whether the disengagement of the petitioner with effect from01.7.2009 is violative of the provisions of Sections 25-F, 25-G and 25-H of the I.D. Act as alleged. If so, what relief the petitioner is entitled to? OPP.
2. Whether the reference is not maintainable as alleged. If so, to what effect? OPR.
3. Whether the reference is hit by the vice of delay and laches as alleged. If so, to what effect? OPR.
4. Relief.

8. On the basis of the aforesaid pleadings, learned Tribunal below passed the award dated 14.1.2013 and decided the reference against the workman. In the aforesaid backdrop, workman has approached this Court in the instant proceedings, praying therein to set-aside the impugned award passed by learned Tribunal below.

9. Having heard learned counsel representing the parties and perused the material available on record vis-à-vis findings returned by the learned Tribunal below in the impugned award, this Court finds that there is no dispute interse parties that petitioner-workman was initially appointed as daily wager on muster roll basis in the year, 2005, whereafter he continued to work till 30.6.2009. On 17.3.2009, a settlement under Section 12(3) of the Act arrived interse parties, whereby it was decided interse parties that workman can be employed within the whole jurisdiction of Jogindernagar as per availability of work. It also stands recorded in the aforesaid settlement that workman will be retrenched as per provisions of sections 25-F and re-employed as per provision of Section 25-G and 25-H of the Act. During the settlement workman gave an undertaking to work anywhere as per his seniority, within the whole jurisdiction of Jogindernagar Forest Division, as per availability of work. He also undertook before the authority that he would report for duties on 16.4.2009. Pursuant to aforesaid settlement though workman resumed duties on 16.4.2009, but he worked only up to 30.6.2009, whereafter allegedly he abandoned the job. Though, claim of the petitioner-workman is that on 1.7.2009 his services were orally terminated, but respondent by way of convincing evidence has successfully proved on record that on 1.7.2009, workman abandoned the job and thereafter despite having received notice failed to resume the duties.

10. Petitioner Ram Dass while stepping into the witness box as PW-1, tendered in evidence his affidavit Ex. PW1/A and reiterated on oath the contents of the petition/statement

of claim, as has been taken note hereinabove. He also placed on record Ex.PW1/B i.e. a copy of demand notice dated 3.7.2009 served upon the respondent by him. In his cross-examination, he fairly admitted that compromise (Ex.R1)had taken place interse him and the respondent in the year, 2009, whereby his services were re-engaged by the respondent in the month of April, 2009 and he worked for approximately 2 ½ months in the year, 2009, but denied that thereafter he left the service willingly. He also denied that Ranger Officer, Jogindernagar had sent him notices dated 8.7.2009, 29.7.2009 and 18.12.2009 calling upon him to resume the work. He also denied that he refused to receive the notices dated 8.7.2009 and 29.7.2009. He also denied in his cross-examination that in the month of December, 2009 Forest Officials visited his residence alongwith the notice and his daughter was informed that the services of the petitioner are required in Chauntra nursery.

11. Respondent with a view to prove that the petitioner himself abandoned the job examined Sh. Kamal Jaswal (RW-1), Range Officer, Joginder Nagar, who deposed that notice dated 18.12.2009 Ex.RW1/A was issued in the name of the petitioner. He deposed that Sh. Anil Kumar, Forest Guard had approached the petitioner alongwith the notice and made report on the notice and returned the same. He stated that notice dated 27.11.2010 was sent to the petitioner under registered cover calling upon him to resume his duties, but such registered letter was received back undelivered with the report that despite repeated attempts, the petitioner is/was not available and his family members informed the postman that the petitioner is out of station. Ex. RW1/B is the copy of notice dated 27.11.2010, Ex.RW1/C is the postal receipt and Ex.RW1/D is the copy of the registered letter/envelope. In cross-examination, aforesaid witness categorically stated that after having received registered notice back, he sent written report to the Divisional Forest Officer, but he did not pass any order for initiation of the disciplinary proceedings against the petitioner.

12. Shri Anil Kumar, Forest Guard (RW-2) proved on record copy of notice dated 18.12.2009 Ex.RW1/A and stated that he visited the house of the petitioner twice with the notice. On 19.12.2009, the mother of the petitioner met him and he told her that petitioner is required to join his duties on 20.12.2009, but petitioner failed to join the duties on 20.12.2009. Thereafter, on 21.12.2009 he again went to the house of the petitioner alongwith one Sh. Joginder Singh and at that time daughter of the petitioner met him and she informed that the petitioner has gone out of station due to some work and as and when he would return she will tell him that he is required to join his duties in Chauntra nursery. Report in this regard was made by him on the notice, which was returned to the Range Forest Officer. The report was also signed by Sh. Joginder Singh as a witness.

13. Sh. Chaman Lal, Forest Guard (RW-3), also deposed that in the year, 2009 while he was posted as a forest guard in upper Chauntra Beat, notices dated 8.7.2009 and 29.7.2009 were issued by him, copies whereof are Ex.RW3/A and Ex.RW3/B, calling upon the petitioner to report for work. He deposed that he had gone to the house of the petitioner personally with the notices in the company of Sh. Love Kumar, but workman refused to receive the notice on the pretext that he was advised by his counsel not to receive the same.

14. Sh. Love Kumar, Forest worker (RW-4) supported the version of RW-3.

15. Sh. P.L. Gupta, Divisional Forest Officer, Joginder Nagar (RW-5) in his affidavit Ex.RW5/A corroborated on oath the contents of the reply filed by him. He also placed on record Ex.RW5/B i.e. the mandays chart relating to Sh. Joginder Singh son of late Sh. Kharku Ram. This witness in his cross-examination admitted that the services of the petitioner were engaged as a daily wager on muster roll basis in the year, 2005, but denied that the services of the petitioner were earlier terminated in the year, 2006. He admitted that the settlement Ex.R1 had taken place. He admitted that no notice was given to the petitioner intimating him that if he fails to report for duty, departmental proceedings will be initiated against him and his services will be terminated.

16. Careful perusal of aforesaid evidence led on record by the respondent clearly suggests that the petitioner after his re-engagement on 16.4.2009 pursuant to settlement dated 17.3.2009 himself abandoned the job on 1.7.2009. The respondent has placed/exhibited on record the notices dated 8.7.2009, 29.7.2009 and 18.12.2009, perusal whereof clearly reveal that repeated opportunity was given to the petitioner to resume duty, but despite that petitioner failed to resume the duty. If the statements made by RW-2 to 4 are read in conjunction juxtaposing each other, it stands duly established on record that repeatedly notices were sent to the petitioner, which were either received by him personally or his family members intimating therein his requirement to join duties at Chauntra Nursery Jogindernagar, but since he failed to resume duty it can be safely inferred that he abandoned the job himself. Cross-examination conducted upon these witnesses if perused minutely, it nowhere suggest that opposite party was able to extract something contrary to whatever aforesaid witnesses stated in their examination-in-chief.

17. It can be safely gathered from the statement of RW-1, Sh. Kamal Jaswal that notice dated 18.12.2009 Ex.RW1/A was forwarded to the petitioner under registered cover calling upon him to resume duties, but such registered letter was received back undelivered. Endorsement by postal authority on registered letter itself suggests that repeated efforts were made to contact the workman but every time it was informed that workman has gone somewhere out.

18. Leaving everything aside, no attempt, if any, has been made by the petitioner to prove that notices, as referred above, were not sent on his address, rather endorsement made by the postal authority on the registered letter, as has been taken note hereinabove, compels this Court to infer/presume that the petitioner was duly served, but despite that he failed to resume duties and as such, learned Tribunal below rightly accepted the version put forth by the respondent that the petitioner himself abandoned the job and as such, there was no requirement, if any, to comply with the provisions contained under sections 25-F, 25-H and 25-G of the Act.

19. Mr. Kulbhushan Khajuria, learned counsel representing the petitioner while making this Court to peruse the pleadings adduced on record made serious attempt to persuade this Court to agree with his contention that since it stands duly admitted that during his employment workman was repeatedly given fictional break with a view to prevent him to complete 240 days in any calendar year so that he cannot claim regularization, tribunal below ought have not concluded that workman did not complete 240 days in a calendar year. However, aforesaid attempt/plea made by learned counsel for the petitioner is of no relevance, especially in the light of the terms of the reference made to the Labour Court-cum-Industrial Tribunal, Dharamshala under Section 10(1) of the Act. Careful perusal of terms of reference as has been taken note hereinabove, nowhere suggests that Tribunal below was required to go into the aforesaid aspect of the matter and as such, no fault can be found with the impugned award passed by the learned Tribunal below. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in **Mukand Ltd. V. Mukand Staff & Officers' Assn (2004) 10 SCC 460**, the Hon'ble Apex Court has held as under:-

> "22.We shall now analyse the submissions made by the learned senior counsel appearing on either side with reference to the pleadings, documents, records and also with reference to the judgments cited. The Reference is limited to the dispute between the Appellant -Company and the `workmen' employed by it.
>
> 23.We have already referred to the order of Reference dated 17.2.1993 in paragraph supra. The dispute referred to by the order of Reference is only in respect of workmen employed by the appellant -Company. It is, therefore, clear that the Tribunal, being a creature of the Reference, cannot adjudicate matters not within the purview of the dispute actually referred to it by the order of Reference. In the facts and circumstance of the present case, the Tribunal could not have adjudicated the issues of the salaries of the employees who are not workmen under the Act nor could it have covered such employees by its a ward. Even assuming, without admitting, that the Reference covered the non-workmen, the Tribunal, acting within its jurisdiction under the Act, could not have adjudicated the dispute insofar as it related to the `non -workmen'.

> 95. The Industrial Tribunal did not have jurisdiction to adjudicate the present dispute inasmuch as it pertains to the conditions of service of non - workmen. The learned single Judge and the Division Bench of the High Court failed to appreciate that parties cannot by their conduct create or confer jurisdiction on an adjudicating authority when no such jurisdiction exists. We have already noticed that the Division Bench has erred in holding that there is community of interest between the workmen and the non-workmen and holding further that the workmen could raise a dispute regarding the service conditions of non - workmen."

20. It is quite apparent from the aforesaid exposition of law that tribunal below cannot go beyond the terms of reference. Since question of artificial breaks, if any, was not referred to the tribunal, it rightly has not ventured to look into that aspect of the matter.

21. Leaving everything aside, this Court has very limited jurisdiction to re-appreciate findings of fact returned by learned Tribunal below, while exercising writ jurisdiction under Article 226 of the Constitution of India. In this regard, reliance is placed upon the judgment passed by the Hon'ble Apex Court in ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157,*** wherein it has been held as under:-

> "16. .....The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or Tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is no entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the

> Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

22. It is quite apparent from the aforesaid exposition of law that writ court while examining the correctness and genuineness of the award passed by Tribunal has very limited powers to appreciate the evidence adduced before the Tribunal below, especially the findings of fact recorded by the Tribunal below and same cannot be questioned in writ proceedings and writ court cannot act as an appellate court. As per the aforesaid judgment passed by Hon'ble Apex Court, error of law, which is apparent on the face of record, can be corrected by writ court but not an error of fact, however grave it may appear to be. Hon'ble Apex Court further held in the aforesaid judgment that if findings of fact is based upon no evidence that would be regarded as error of law, which can be corrected by a writ of certiorari. Writ of certiorari can be issued, if it is shown that in recording said findings, Tribunal erroneously refused to admit admissible evidence or erroneously admitted inadmissible evidence, which influenced impugned findings.

23. Consequently, in view of the detailed discussion as well as law referred herein above, this Court sees no reason to interfere with the well reasoned award passed by the Tribunal below and as such, same is upheld. The present writ petition is dismissed being devoid of any merits alongwith pending applications, if any.

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

Yadav Singh ....Petitioner.

Versus

H.P. State Electricity Board Ltd.
& another ...Respondents.

CWP No. 1137 of 2019
Decided on: 07.10.2020

Constitution of India, 1950:- Article 226- The petitioner engaged as a beldar in the year 1990 – his services were disengaged in the year 1998—petitioner raised industrial dispute in the year 2010—rejected by government on ground of delay and latches in the year 2011—the petitioner filed c w p where by direction was issued if employer required additional man power to consider the case of petitioner—order rejecting the dispute raised by the petitioner was not set aside ---the petitioner filed representation to department for implementation of judgment – department invited application for posts of junior tea mates but petitioner was not given any preference--- the

petitioner again approached hononrable high court the petition was withdrawn—thereafter order dated 3.12..2018 of deputy labour commissioner *was challenged where it was held that dispute raised by petitioner* was stale –no fault can be found with order declining to refer dispute raised by petitioner to ld labour court as service terminated in 1998 -- impugned order passed on 3.12.18—initial delay in raising industrial dispute was on part of petitioner who raised dispute with.

For the petitioner : Mr. G.R. Palsra, Advocate.

For the respondents : Mr. Tara Singh Chauhan, Advocate, for respondent No.1.
Mr. Sumesh Raj, Mr.Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocate Generals, with Ms. Divya Sood, Deputy Advocate General, for the respondent No.2/State.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

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

> "i) That the order dated 03.12.2018 passed by respondent No.2 contained in Annexure P-1 may kindly be set aside/quashed by issuing a writ of certiorari.
> ii) That the respondent No.2 may kindly be directed to refer the claim/dispute of the petitioner to the Ld. Labour Court, Dharamshala, District Kangra, H.P. by issuing a writ of mandamus or in the alternative, the respondent Board may kindly be directed to re-engage to the petitioner".

2. The petitioner was initially engaged as a Beldar somewhere in the year 1990 and his services were disengaged according to the petitioner in the year 1998. Feeling aggrieved, he raised an industrial dispute somewhere in the year 2010, which was rejected by the Government on the point of delays and latches in the year 2011. Feeling aggrieved, the petitioner filed CWP No.8088 of 2012 before this Court, which was decided by this Court by issuing directions to the respondent-Electricity Board that in case the employer required additional manpower on account of additional work requiring the engagement of fresh hand, then they may consider the case of the petitioner. In other words, the order vide which the dispute raised by the petitioner was rejected by the State on the ground of delays and latches, was not set aside by this Court in the earlier writ petition which was filed by the petitioner and said order to said extent attained finality. It appears that thereafter, the petitioner filed a representation to the department concerned for implementation of the judgment. Vide

Notification dated 19.07.2014, the department invited applications for filling up the posts of Junior Tea-Mates, but the petitioner was not given any preference. He again approached this Court by way of CWP No.3076 of 2016, titled as Manohar Lal and others Versus Himachal Pradesh State Electricity Board Limited and others, which stood decided by this Court on 14.12.2016 in the following terms:-

> "After hearing for a while, Learned Counsel for the petitioners stated at the Bar that the petitioners may be permitted to withdraw writ petition with liberty to seek appropriate remedy, in view of the ratio laid down by the Apex Court in Reghubir Singh versus General Manager, Haryana Roadways, Hissar, reported in 2014 AIR SCW 5515 and also to seek relief sought in the instant writ petition, at appropriate stage. His statement is taken on record. Accordingly, the writ petition is disposed of, with liberty, As prayed for, alongwith all pending applications. The interim directions, if any, shall stand vacated".

3. It is thereafter, that order dated 03.12.2018 has been passed by the Deputy Labor Commissioner which stands impugned by way of 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. Vide impugned order, Deputy Labour Commissioner has held that the dispute raised by the petitioner was stale, had faded away with the passage of time and at a belated stage, there was no justification whatsoever to refer the matter to learned Labour Court/Industrial Tribunal for adjudication. This conclusion was arrived at by the officer concerned after chronologically dealing with the events that took place after the first request made by the petitioner to raise industrial disputes stood dismissed by the appropriate Government. The relevant portion of the order passed by the officer is reproduced hereinbelow:-

> "Whereas, as per demand notice dated nil (received on 25-03-2017) workman has alleged that he has filed his representation before the above mentioned employer in compliance to above orders of the Hon'ble High Court of Himachal Pradesh and the same has been rejected by the employer. He has not assailed the orders of the employer before the Hon'ble High Court of Himachal Pradesh by way of review petition/ appeal. It is found that this case has already been decided by the Hon'ble High Court of Himachal Pradesh and had already attained finality. The workman had not adduced any additional reasons/ materials in support of his claim with authentic justification for the condonation of inordinate delay of about 16 years and the judgment of Apex Court in Raghubir Singh versus General Manager, Haryana Roadways had also been discussed by the Double Bench of Hon'ble High Court of Himachal Pradesh in CWP No.1912/2016, titled Smt. Bego Devi v/s State of H.P. & Others.

> The Hon'ble High Court of Himachal Pradesh in CWP No.398/2011, titled M.C. Paonta Sahib vs. State of H.P. & others has held the similar view which was further upheld by the Full Bench of the Hon'ble Court in CWP No.1486 of 2007 titled Liaq Ram vs. State of H.P. The Division Bench of Hon'ble High Court in Himachal Pradesh vide judgment dated 26-10-2016 in CWP No.1912/2016, titled Smt. Bego Devi v/s State of H.P. & Others, clubbed with other 24 CWP's containing common questions of law and facts, has upheld the various orders of declining of reference of this office and has held that, "it is beaten by law of land that delay takes away the settings of law. A person who does not seek relief within time, his petition has to be dismissed only on the grounds of delay and latches, otherwise, it would amount to gross misuse of jurisdiction and disturb the settled position.
>
> Therefore, keeping in view the facts and circumstances of the dispute as discussed hereinabove, and as per provisions contained in Section 10 (1) of the Industrial Disputes Act, 1947, I have formed an opinion and arrived at the conclusion that the alleged dispute stale, faded away with the passage of time, in this belated stage there is no justification whatsoever to refer this matter to the Ld. Labour Court/Industrial Tribunal for adjudication, hence, declined. Let the copy of this Order be conveyed to all concerned parties for information as per provisions contained in Section 12 (5) of the Industrial Disputes Act, 1947".

6. In my considered view, there is no infirmity in the order which has been passed by the competent authority, declining the reference of the matter to learned Labour Court/Industrial Tribunal for adjudication.

7. As, I have already mentioned hereinabove also, the dispute initially raised by the petitioner was dismissed by the Government as far back as in the year 2011, on the ground of delays and latches. The order so passed by the appropriate Government was unsuccessfully challenged by the petitioner before this Court as it is a matter of record that in the writ petition which was so filed by the petitioner, the order passed by the Government was not set aside by this Court. Even the subsequent petition which was filed by the petitioner, was not adjudicated by this Court on merit and the same in fact was withdrawn by the petitioner in terms of contents of the order passed by this Court which already stand reproduced hereinabove.

8. That being the case, no fault can be found with the order which has now been passed by the competent authority declining to refer the matter for adjudication to the learned Labour Court/ Industrial Tribunal on the ground that the dispute has become stale and has faded away with the passage of time. It is pertinent to mention, at this stage, that services of the petitioner were terminated as per him also as far back as in the year 1998. Today, we are in the year 2020. The impugned order has been passed by the authority concerned on 03.12.2018. Initial delay in raising the industrial dispute was at the behest of the petitioner who admittedly raised the dispute with regard to his illegal termination after a decade as from

the date when his services were terminated. That being the case, the petitioner otherwise also cannot be permitted to take the advantage of his own acts of omission.

9. In view of the observations made hereinabove, as this Court does not finds any merit in the present petition, the same is dismissed. Pending miscellaneous applications, if any, also stand disposed of.

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

Pooja Sharma .....Petitioner

Versus

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

CWPOA No. 1320 of 2019
Reserved on : 29.10.2020
Decided on: 02.12.2020

Constitution of India, 1950:- Article 226- Petitioner-sportsman-passed senior secondary examination in commerce in 2000-B. com in 2003-M A economics in the year 2006 –completed J B T on 2.11.2011- on 12.09.2011 state advertised 1308 posts of J B T- eligibility criteria qualifying marks in TET 60%-before petition –passed TET 56% and during petition passed T E T by securing marks 91/150 in year 2014- 3% posts reserved for outstanding and distinguished sportsman for employment in govt, board/ corporation/university. Petitioner is claiming her appointment against the posts reserved for outstanding sports persons on the basis of criteria provided in category No. IV under sub-clause V, which provides that an outstanding sports person having at least three times participation in 'National Championship' and 'Senior National Championship' shall be eligible to be considered under quota for such sportsmen. Petitioner is claiming her eligibility and right on the basis of her participation in 31st Senior (Women) National Handball Championship held in Guwahati (Assam) w.e.f. 11th February to 16th February, 2003, 29th Senior (Women) National Handball Championship held in Chandigarh (U.T.) w.e.f. 13th February to 18th February, 2001 and 13th Sub-Junior National Handball Championship Boys and Girls (under 15 years) held in Jaisalmer (Rajasthan) w.e.f. 3rd to 7th November, 1996 as evidence from certificates issued by the concerned organizations placed on record as Annexure P-4 (Colly.). The criteria provides that sports person should have three times participation in National Championship(s) and Senior National Championship(s). It does not preclude Sub-Junior National Championship. As a matter of fact, "National Championship" includes all kinds of National Championships unless excluded specifically.

In view of aforesaid interpretation of Rules which is coming out of the criteria notified by the Government, petitioner is definitely falling in the category IV, sub category V of outstanding sportsmen who are eligible to be considered against the post reserved for outstanding sports person. Therefore, non-inclusion of the name of petitioner in the list of outstanding sports person eligible to be sponsored and considered for employment under the quota reserved for outstanding sports person as unreasonable, irrational and arbitrary.

For the petitioner: Mr. Anup Rattan, Advocate through video conferencing.

For the respondent: Mr. Raju Ram Rahi, Dy. A.G. through video conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Petitioner herein is a Sportsman who has passed her Senior Secondary examination in Commerce in March, 2000 and B. Com in the year 2003 and M.A. Economics in the year 2006 and she has also completed her Junior Basic Trained Teacher course ('JBT' in short) in September, 2011 in 1st Division and she has registered herself in District Employment Exchange Una on 02.11.2011.

2. Respondent-State on 12.09.2009 had notified 1308 posts of JBT to be appointed in Government Primary Schools of the State on contract basis on a fixed remuneration vide advertisement, wherein passing of Teacher's Eligibility Test (TET) was mandatory requirement for determining the eligibility of a candidate. Qualifying marks for passing TET is 60%.

3. Before filing petition, petitioner had appeared in TET and had scored 84 marks out of 150 marks i.e. 56%. During pendency of present petition, petitioner has passed JBT, TET in the year 2014 by securing 91 marks out of 150 marks.

4. There is reservation of 3% posts for outstanding/distinguished sportsmen for employment in the Departments/Boards/Corporations and Universities.

5. Vide communication dated 22.01.2002. Department of Personnel, Government of Himachal Pradesh had communicated decision of the Government to all concerned about revised criteria for selection of outstanding sportsmen who will be eligible for employment in Government Departments/Boards/Corporations and Universities against the reservation in services provided to distinguish sportsmen. The various sports competitions have been classified as follows:-

Criteria for selection of outstanding sportspersons who will be eligible for employment in Government Departments/Boards/Corporation and Universities:-

The various sports competitions will be classified as follows:-

Category No.1	I	Medical winners of Olympic Games/Winter Olympics.
	II	Commonwealth Games.

	III	Medal winners of Asian Games/Winter Asiad.
Category No.II	I	Participation in Olympic Games
	II	Participation in Commonwealth Games.
	III	Participation in Asian Games.
Category No.III	I	Medal winners in South Asian Federation (SAF) Games
	II	Medal winners in National Games
	III	Medal winners in recognized Senior National Championship.
Category No.IV	I	Medal winners in All India Inter-Versity Sports Tournaments.
	II	Medal winners in All India National School Games.
	III	Medal winners in recognized Jr. National Sports Championships.
	IV	Participation in South Asian Federation (SAF) Games.
	V	At least three times participation in National Championship and Senior National Championship.

6. Petitioner herein is claiming her appointment against the posts reserved for outstanding sports persons on the basis of criteria provided in category No. IV under sub-clause V, which provides that an outstanding sports person having at least three times participation in 'National Championship' and 'Senior National Championship' shall be eligible to be considered under quota for such sportsmen. Petitioner is claiming her eligibility and right on the basis of her participation in 31st Senior (Women) National Handball Championship held in Guwahati (Assam) w.e.f. 11th February to 16th February, 2003, 29th Senior (Women) National Handball Championship held in Chandigarh (U.T.) w.e.f. 13th February to 18th February, 2001 and 13th Sub-Junior National Handball Championship Boys and Girls (under 15 years) held in Jaisalmer (Rajasthan) w.e.f. 3rd to 7th November, 1996 as evidence from certificates issued by the concerned organizations placed on record as Annexure P-4 (Colly.).

7. According to reply filed on behalf of Department of Youth Service and Sports, Himachal Pradesh, petitioner was not registered in the category of outstanding sports person for selection under 3% reservation scheme provided for such sports persons for the reason that she has participated two times in Senior National Handball Championship held in the year 2001 and 2003, once in Sub Junior National Handball Championship in the year 1996 and once in North Zone Handball Championship, thrice in Inter-Versity tournaments. Though it is not stated in so many words, however, from the tone and tenor of reply, it is apparent that participation in Senior National Championship of the petitioner has only been taken into

consideration but her participation in Sub-Junior National Handball Championship has not been taken into consideration by the Department of Youth Services for registration of her name for sponsoring as an outstanding sports person after registration in the Department of Youth Sports.

8. The criteria provides that sports person should have three times participation in National Championship(s) and Senior National Championship(s). It does not preclude Sub-Junior National Championship, rather it provides that there must be three times participation in 'National' Championship, which must include participation of Senior National Championship. It does not say that all three times participation should be in Senior National Championship only or in National Championship only. It also does not say that National Championship should not be Sub-Junior or Junior National Championship. As a matter of fact, "National Championship" includes all kinds of National Championships unless excluded specifically. Thus, Senior National Championship is also included in National Championship. But in relevant criteria both Senior National Championship and National Championship, have been mentioned. Thus, it qualifies that sports person must have participated in Senior National Championship besides other National Championships. It does not provide number of participation either in other National Championship or in Senior National Championship. It also does not provide that the National Championship should not be Sub-Junior or Junior National Championship. Participation in any kind of National Championship has to be considered to be a valid Championship in National Championship for the purpose of inclusion of name of sports person in the category of outstanding sports person for employment in Government Departments/Boards/Corporations and Universities. The only qualification under the relevant criteria is that the sports person in addition to National Championship must have participated in Senior National Championship also as Senior National Championship is also National Championship but in the criteria, it has been specifically mentioned that sports person should have participation in National Championship and Senior National Championship. It qualifies that in addition to participation in any kind of National Championship, sports person must have at least one participation in Senior National Championship.

9. In view of aforesaid interpretation of Rules which is coming out of the criteria notified by the Government, petitioner is definitely falling in the category IV, sub category V of outstanding sportsmen who are eligible to be considered against the post reserved for outstanding sports person. Therefore, non-inclusion of the name of petitioner in the list of outstanding sports person eligible to be sponsored and considered for employment under the quota reserved for outstanding sports person as unreasonable, irrational and arbitrary and this deserves to be interfered with by the Court.

10. Petitioner has also prayed for filling up the vacancies notified by the State on the basis of Recruitment and Promotion Rules prevalent at the time when these posts had fallen vacant. In my considered opinion, this prayer is not tenable in the eye of law as posts are to be filled up on the basis of Rule existing as on date when post(s) is advertised or notified for filling-up.

11. At the time of Notification of the vacancies, passing of Teachers Eligibility Test was a mandatory requirement to become eligible to be appointed as Teachers in the schools. For passing TET, a candidate has to secure 60% marks. Earlier, petitioner had appeared in the TET examination and had secured 84 marks out of 150 marks, which is 56% and thus as per existing norms, she had not qualified. But now, as recorded supra she has qualified TET in 2014 by obtaining 91 marks out of 150 marks.

12. For having played three National Championship including one Senior National Championship, petitioner was entitled for sponsorship of her name to the post of JBT. However, as a matter of fact, she had not qualified TET at the time of filing of petition, however, she has qualified TET in the year 2014 result whereof, as per photocopy of certificate produced by learned counsel, has been declared on 23.02.2015. Therefore, after February, 2015, petitioner has become eligible to be appointed as JBT Teacher in all respect but for considering her not entitled to be sponsored as an outstanding sports person, her name was not sponsored for appointment even after passing of TET examination. Vide order dated 21.09.2012, at the time of entertaining the present petition, Division Bench of this Court has directed the respondents not to fill up one seat from 3% quota meant for outstanding sports persons, therefore, as of now the said seat was and is available for appointment of the petitioner.

13. In view of above discussion, petitioner is held entitled to be enlisted amongst the outstanding sports person in the Department of Youth Sports Himachal Pradesh for sponsoring her name under the category of outstanding sports person. Respondents No. 2, Secretary (Youth Services and Sports) and respondent No. 3 Director, Youth Services and Sports are directed to take all necessary steps and action for inclusion of her name amongst outstanding sports person in the Department of Youth Sports Himachal Pradesh for employment in the category IV Sub-Clause V of the revised criteria notified by the Government for selection of outstanding sports person for employment under 3% reservations of sports person within 15 days of passing of the judgment. Respondents No. 2 and 3 are also directed to sponsor name of petitioner for employment as JBT Teacher in Elementary Education Department on or before 31st December, 2020 and Elementary Education, Department shall consider her name for appointment under 3% quota meant for outstanding sports person against one seat directed by the Division Bench of this Court, not to be filled-up vide order

dated 21.09.2012, if she is otherwise found eligible for such appointment, on or before 31.01.2021.

14. Petitioner shall be considered to be in service as JBT w.e.f. 01.04.2015, a date after 23.02.2015 i.e. date of passing TET by her, for all consequential benefits but except actual monetary benefits which shall be granted to her on notional basis w.e.f. 01.04.2015 till date of her actual appointment.

15. In present case, petitioner has also prayed for issuing general direction to the respondent-State to give relaxation of 5% marks to the outstanding sports person for qualifying TET. To support this prayer, petitioner has placed reliance upon the decision of the respondent-State communicated by the Secretary, Elementary Education to Director, Elementary Education vide communication dated 24.04.2012 (Annexure P-9), whereby Government has decided to give relaxation of 5% in minimum qualifying marks for qualifying TET to the candidates of the category of Schedule Caste/Schedule Tribes/OBC and physically disabled.

16. Though, reliance placed upon by the petitioner on this decision of the Government, to support her claim for relaxation to sports persons of 5% marks in minimum qualifying marks for passing TET, may be misconceived for the reason that an outstanding sports person cannot be considered equivalent to a candidate of SC/ST/OBC or physically disabled category. Relaxation granted on the basis of social and physical disabilities cannot be a basis for relaxation to sports persons. Sports persons cannot be equated with socially backward or physically disabled persons. However, candidates belonging to the outstanding sports persons category itself belong to a distinct class for which they can claim relaxation as prayed. But, it is a matter of policy, decision regarding which is to be taken by the Government.

17. In fact, sports is also an education and it cannot be extra curricular activity. For overall development and healthy life, sports activities are necessary for a person. Considering the importance of sports in human life, the Government of India, recently has introduced 'Khelo India Programme'. This programme is stated to have been introduced to revive the sports culture in India at grass root level by building a strong framework for all sports played in our country and establish India as a great sporting nation and under this programme Khelo India Youth Games were also launched by the Hon'ble Prime Minister and it has been propagated that key objectives of Khelo India is to promote fitness across schools, women and grass-root levels and to achieve this objective, Khelo India Youth Games is an event promoted by the Hon'ble Prime Minister and Sports Minister with motive to make it understand that sports cannot be treated as an optional subject but it is an essential part of education which has to be accepted by all.

18. It is a reality that overwhelming importance currently placed on marks and percentages has led to increasing self-isolation amongst young students, who live in 'little boxes' of their own and are sucked into a mindless, test-oriented rat race to get ahead in life. Most people confuse sport with either just the playing of it, or look at it as a subject to be taught in classrooms, out of text books. In fact, sports is much more than either of these two things and it has to become a way of life to define and shape a young person what he can become. Sport also teaches people to take on-the-spot decisions under pressure and work out success strategies in dynamically changing situations. Young people need to get used to this, because only winners perform their best under pressure. Sport does this brilliantly, in training sessions and competitions and thereby, prepares participants for life itself. In the planned and graded training processes of a sports team, one can easily discern the gradual erosion of selfishness and growth of teamwork and self-discipline, and over the time, the emergence of the qualities of successful sportsmen intelligence, strength, stamina, courage, independence and adaptability, the very same qualities that ensure success in other walks of life. It also automatically develops leadership skills and teaches man management strategies, as young players try to keep their teammates focused and motivated, often in tough situations. Most importantly, sport equips young people to handle failure. It teaches them to come back to the ground the next day, after a first ball duck the day before. Dealing with failure is an imperative life skill that builds self-belief and mental strength. Sport teaches this every day and to balance winning and losing, which becomes a habit for life. Athletes have to manage their time effectively. From their school days onward, they have to balance academic work and athletic commitments, along with spending time with family and friends. And this often leads to athletes developing time management strategies and techniques that translate well into the working world. Athletes are willing to make sacrifices to achieve a goal. They will give up time they would rather spend relaxing in order to practice at off hours, pushing themselves to get better and to help their teammates get better as a whole.

19. Sports are essential part of life which is mandatory for healthy, happy and disciplined society, but it consumes time and the persons, who offers themselves to be an outstanding sports person, have to spend major part of their life in the ground instead of living in little boxes to cram the bookish knowledge and, therefore, definitely they are a separate distinct class than the other candidates aspiring employment in Government Departments/Boards/ Corporations and Universities and thus deserves for special treatment.

20. In order to achieve the goal and fulfill the object of programmes of the Government like Khelo India and Fit India, it would be imperative for the Government to provide relaxation in the minimum qualifying marks to the category of outstanding sports person also

for passing TET. Recently, during fitness India Dialogue 2020, Hon'ble Prime Minister by saying that 'Fitness ki dose, aadha ghanta roz' (a dose of fitness every day for half an hour), has also urged all citizens of the country to take fitness and physical activity seriously, especially in these unprecedented times of a pandemic by elucidating the significance of a healthy body and mind.

21. In the light of above discussion, respondent-State is also directed to consider the case for granting appropriate relaxation to the outstanding sports persons who are entitled for appointment under 3% reservation for sports person, in minimum qualifying marks for passing TET and to take an appropriate decision in this regard on or before 31st January, 2021.

22. The writ petition is disposed of in aforesaid terms. Pending application(s), if any, shall also stand disposed of.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, JUDGE

Bhuvnesh Chand Sood ...Petitioner

Versus

State of H.P. & Ors. ...Respondents

CWP No. 7264 of 2012
Reserved on: 12.10.2020
Decided on: 16.10.2020

Code of Civil Procedure, 1908-The petitioner- claims to have filed the petition as "probono public"-respondent no 5 in the year 1989-90,chief minister, formed a trust "VIVEKA NAND MEDICAL RESEARCH TRUST"-A dream shown to residents of district KANGRA for setting up multi speciality hospital-after the year 1992 construction of building a multi facility hospital started which enthuse people of getting free and easily accessible medical facilities-after establishment of same, -people felt cheated as instead of charitable hospital ,a commercial hospital,contrary to provisions of Indian trusts Act.-HELD--The mere fact that the authorities have done the work with requisite promptitude cannot be a ground to casts suspicion on the working of the respondents.--The petitioner seeks publicity and has filed this petition with an ulterior motive to settle scores with the 5th respondent.*The* petitioner has indulged in leveling wild and reckless allegations besmirching the character of others, more particularly, respondent No. 5 who, as per the petitioner himself, happens to be the former Chief Minister of the State of Himachal Pradesh and also the former Union Cabinet Minister.

Cases referred:

Environment and Consumer Protection Foundation vs. Union of India and others (2017) 16 SCC 780;

Jaipur Shahar Hindu Vikas Samiti vs. State of Rajasthan and others (2014) 5 SCC 530;

Prashant Bhushan and Anr., Suo Motu Contempt Petition (CRL.) No. 1 of 2020, decided on 31.08.2020;

R & M Trust v. Koramangala Residents Vigilance Group (2005) 3 SCC 91;
S.P. Anand vs. H. D. Deve Gowda, (1996) 6 SCC 734;
State of Uttaranchal Vs. Balwant Singh Chaufal (2010) 3 SCC 402;
Tehseen Poonawalla vs. Union of India and another (2018) 6 SCC 72;

For the Petitioner : Mr. Sanjeev Bhushan, Sr. Advocate with
Mr. Rajesh Kumar, Advocate.

For the Respondents **:** Mr. Ashok Sharma, Advocate General
with Mr. Vinod Thakur, Mr. Shiv Pal Manhans, Addl. A.Gs., Ms. Seema Sharma, Mr. Bhupinder Thakur and Mr. Yudhvir Singh Thakur, Dy.A.Gs., for respondents No. 1 to 3-State.

Mr. Bhupender Gupta, Sr. Advocate with Mr. Janesh Gupta, Advocate, for respondents No. 4 and 5.

Mr. Vikas Rathore, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioner claims to have filed this petition as *probono publico* wherein it is averred that the 5th respondent, somewhere in the year 1989-90, when he happened to be the Chief Minister of the State, formed a Trust in the name of "Vivekanand Medical Research Trust', which according to the petitioner was a dream shown to the residents of Kangra District, more particularly, Palampur, regarding the setting up of multi speciality hospital exactly on the line of the Post Graduate Institute of Medical Education and Research, Chandigarh, having all facilities for heart, kidney, lungs etc.

2. The meeting of the said Trust was held on 17.11.1992 and the same was presided over by the then Financial Commissioner-cum-Secretary, Health to the Government of Himachal Pradesh, wherein it was decided that the Trust be registered under the Society Registration Act, 1860.

3. As per the knowledge of the petitioner, the Trust was got registered on 06.12.1992. After 1992, when the 5th respondent was not the Chief Minister of the State but had become the Union Minister, started building a multi faculty hospital, which enthuse the people of the area, that free and easily accessible medical facilities in multi faculty hospital would be available to them. But when the same was established, the people of the area felt cheated and a fraud has been committed upon them by not establishing charitable hospital but a commercial hospital, that too, contrary to the provisions of Indian Trusts Act (for short the "Act"). Not only this, even the nature of the land which was earlier classified as 'Tea Garden' was illegally changed to 'Banjar Qadim' i.e. land not cultivated for six seasons.

4. In addition thereto, the land which otherwise belonged to National Biological Research Institute was illegally transferred in the name of the State Government and thereafter in the name of the Trust overnight.

5. Above all, the Trust entered a memo of understanding with the Jai Parkash Seva Sansthan, and the Trust was comprising of 15 members, out of which 9 members belong to Jai Parkash Industries, which was a business venture.

6. Lastly, it is averred that on the influence exercised by respondent No. 5, a large chunk of land was leased out at the rate of Rs.1/- per year for 99 years vide order of the FC-cum-Secretary (Health) to the Government of Himachal Pradesh.

7. It is in this background, the instant petition has been filed for the grant of following substantive reliefs:-

> "(i) That a writ in the nature of mandamus may be issued directing some independent agency to enquire the entire episode of formation of trust and the other illegalities as committed by the trust starting from the lease deed uptill the formation of Kayakalp.
>
> > (ia) That a writ in the nature of mandamus may be issued and the transfer of land comprising in Khata No. 11 min, Khatauni No. 35, Khasra Nos. 424/210, 426/213 and 427/213 in the name of State of Himachal Pradesh may very kindly be declared as null and void as the same has been transferred from Council of Science and Industrial Research without following due process of law.
> >
> > (ib) That a writ in the nature of mandamus may be issued and the change of nature of above said land from Tea Garden to Banjar Kadim may very kindly be declared as null and void.
>
> (ii) That a writ in the nature of mandamus may be issued directing independent agency that suitable action may be taken against the erring officials who have helped the formation of such illegal trust.
>
> (iii) That a writ in the nature of mandamus may be issued directing the State to take over the entire property of the trust and run the same itself for the purpose it was formed.
>
> (iv) That a writ in the nature of mandamus may be issued directing the authorities concerned to initiate appropriate criminal proceedings against the erring persons for breach of trust of the local people."

8. Authorities of the State i.e. Secretary (Home), Secretary (Health) and Secretary (Revenue) have been arrayed as respondents No. 1 to 3 and have filed their joint reply wherein Preliminary Submissions have been made to the effect that the present petitioner has no locus

standi to file and maintain the instant petition for want of jurisdiction, as the matter pertains to intricate questions of facts which require to be proved by leading evidence and, therefore, the present petition is liable to be dismissed on this score alone.

9. On merits, it has been averred that the State Government during the year 1992, decided to set up State Level Multi Speciality Hospital at Village Holta, District Kangra through Vivekanand Medical Care, Education & Research Trust, for which land was to be provided on lease basis by the State Government under the scheme in force at that relevant time.

10. It has been admitted that the land comprising Khata No. 7 min. Khasra Nos. 424/210, 426/213, 427/213, Kitas 3 area measuring 16-14-01 hectares situated in mohal Holta was in the name of National Biological Research Institute. It was averred that the inspection of Girdavari of said land was conducted on 30.04.1992 and as per report/order of AC Ist Grade, Palampur, the nature of land was recorded as "Banjar Qadim" instead of Tea Garden. On 01.05.1992 vide mutation No. 21, the above said land was vested in favour of State of Himachal Pradesh. Out of 16-14-01 hectares, land comprising Khasra No. 424/210, 426/2013, 427/2013 Kitas 3 area measuring 16-05-05 hectares was leased in favour of the Vivekanand Medical Research Trust, Palampur vide lease deed at the rate of Rs.1/ per year for 99 years.

11. Respondent No. 4 - Trust has filed reply wherein in the preliminary submissions issues regarding the locus standi, maintainability, the petitioner having not approached this Court with clean hands, the petition has been filed with mala fide intention and ulterior motives, the petitioner is guilty of *suppresio varie and suggestio falsie* by making false and reckless allegations, have been raised.

12. On merits, it has been submitted that a Trust was set up in the year 1992 for establishing a multi speciality hospital under the name and appellation of Vivekanand Medical Care, Education and Research Trust with Dr. Pratap Reddy of Apollo fame as professional medical trustee, to play pivotal role in the trust owing to his previous valuable experience in the filed. It is also admitted that the Secretary (Health) to the Government of Himachal Pradesh, was the Chairman of that Trust. However, it cannot be inferred from this arrangement that the Trust was meant to be controlled mainly by the government officials. It is further averred that since no substantial action was taken on the ground for 8 years, the Apollo people lost interest and, thus, the project was virtually abandoned. However, some altruistic people like respondent No. 5 were keen to pursue the idea of creating a multi-faculty medical institution at or near Palampur and picked up the thread but found that the Apollo people had become un-interested and virtually abandoned the project, therefore, he strove to organize a trust with the help of some humanitarian persons of the region. These efforts culminated in the founding of the Trust known as Vivekanand Medical Research Trust on 11.09.2000.

13. As regards the Trust becoming a commercial venture, the same has been emphatically denied and it is claimed that the tariff charged is far lower to the similar kind of institute located in Bangalore and Pune. That apart, free treatment is given to the poor people and concessions are being given to the people belonging to the BPL, Antyodaya families.

14. As regards the lease and trust deed, it is averred that the trust deed was registered on 11.09.2000 and immediately thereafter the trust applied for lease which was finally signed on 03.03.2001 i.e. after a period of more than five months. The revenue records reflect that the names of the Government of Himachal Pradesh and Health Department are entered in the column of ownership and possession and the same was classified as "Banjar Qadim". Since respondent Trust was founded in the year 2000 and the corrections in the revenue records were carried out prior to its formation, therefore, the petitioner cannot be permitted to make capital of such change. It is averred that when the possession of the land handed over to the respondent after lease, no Tea Garden was in existence and the nature of the land was recorded in the revenue was "Banjar Qadim".

15. For completion of record, we may notice that an application for impleadment of the Council of Science and Industrial Research, Palampur, (for short 'CSIR') as party-respondent was filed by the petitioner and in reply thereto the CSIR has set out how it becomes initially the owner of the land and how the same was transferred to other institutes like H.P. Krishi Vishwa Vidalya presently known as SCK Himachal Pradesh Krishi Vishwavidalaya, Kendriya Vidalaya, H.P. Housing Board etc. It is averred that the Government of Punjab had issued Notification under Section 4 of the Land Acquisition Act, 1894 on 04.01.1996 which was published in the official gazette on 14.01.1966 for acquisition of 12,396 kanals 1 marla of land in Tikka and Mauza Banuri, Bharmat Upperli, Jhalred, Holta, Tehsil Palampur, District Kangra, for the purpose of setting up of National Biological Research Institute. Palampur. The said land was acquired by the Collector Kangra, District Kangra vide award dated 08.07.1996 for setting up of National Biological Research Institute, Palampur. In pursuance to the award of the Collector, the compensation amount was deposited with the Land Acquisition Collector, Kangra. After the re-organization of the State of Punjab, Kangra District was added to the State of Himachal Pradesh and the compensation paid to the owners and occupants of part of the acquired land by the Revenue Assistant and was duly deposited in the Government Treasury and the owners and the occupants received the said compensation.

16. It is further averred that the establishment of National Biological Research Institute was later on dropped and in the year 1978 the part of the property was handed over to the Regional Research Laboratory, Jammu, now re-named as Indian Institute of Integrative Medicine (IIIM) another unit of CSIR for research etc. The replying respondent wanted to

establish a laboratory with wider objective and research programme and therefore, it established its complex at Palampur in the year 1983 known as CSIR complex, which was subsequently named as Institute of Himalayan Bio-resource Technology (IHBT), Palampur. Various portions out of the acquired land were allotted by the State of Himachal Pradesh to different parties. Some land was given for setting up H.P. Krishi Vishwavidalaya presently known as CSK H. P. Krishi Viswavidalaya, Palampur, measuring 236 acres (95-43-95) hectares) which was owned by National Biological Research Laboratory (CSIR) out of this 7 acres of land had been given to the H.P. Housing Board and 21 acres of land was given to Kendriya Vidalaya, Palampur. In addition to this, 1.004 acres of land was given to the Army for path and 0-65-77 hectares was retained for public path. Therefore, 186.2 acres of land was given to NBRI (CSIR) which was the left out area out of 236 hectares meant for research laboratory. In this behalf, letter dated 10.08.1978 of Deputy Commissioner, Kangra to Secretary Revenue to the Government of H.P. and letter dated 26.08.1978 from Deputy Secretary (Revenue) to Deputy Commissioner, Kangra and letter dated 04.03.1991 sent by the Deputy Commissioner, Kangra, to Sub Divisional Officer (Civil), Palampur and the representation given by Administrative Officer, CSIR, Palampur to the Settlement Officer, Kangra dated 04.05.1991. The mutation in the name of CSIR, Palampur was entered on 30.07.1980 in respect of the acquired land including the land comprised in Khasra No. 424/210, 426/213, 427/213 measuring 16-14-01 hectares in mauza Holta, Tehsil Palampur, District Kangra. It is further averred that since the replying respondent was not aware of the vesting of this land in favour of the replying respondent in pursuance to the award or the vesting thereof in favour of the State Government or leasing out the same to the Trust, the replying respondent, at this stage, is not in a position to comment on the same. However, it is true that Vivekanand Memorial Trust has set up Vivekanand Medical Research Trust and “Kayakalap” on the land comprised in aforesaid three khasra numbers, having come to know of the fact that the land in dispute belongs to CSIR and that it has subsequently vested in the State Government who leased out the same in the name of the Trust.

17. We may, at this stage, observe that the petitioner despite this petition being pending since 2012, has not tried to controvert the contents of any of the replies filed by the respondents by filing rejoinder(s).

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

18. It is contended by Mr. Sanjeev Bhushan, learned Senior Advocate, duly assisted by Mr. Rajesh Kumar, learned Advocate, that the trust deed executed in violation of the provisions of the Act and is, thus, illegal. It is further contended that the founders of the trust

had shown the desire for the formation of the charitable trust and further shown willingness of contributing their properties for the purpose of corpus of the trust, which is a requirement of law as per Section 3 of the Act but founder of the Trust created a camouflage to show that they have donated their properties whereas the same was not done as none of the founder members had donated the property for initial corpus.

19. Mr. Sanjeev Bhushan, learned Senior Advocate, has also invited our attention to Section 5 of the Act, to contend that the trust deed does not contain even a single word regarding the compliance of provisions of Section 5 of the Act

20. Sections 3 and 5 of the Act, reads as under:-

> "3. Interpretation clause-"trust"- A "trust" is an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner:
>
> "author of the trust", "trustee"; "beneficiary";, "trust property", "beneficial interest"; "instrument of trust" -The person who reposes or declares the confidence is called the "author of the trust"; The person who accepts the confidence is called the "trustee"; the person for whose benefit the confidence is accepted is called the "beneficiary"; the subject-matter of the trust is called "trust property" or "trust money"; the "beneficial interest" or "interest" of the beneficiary is his right against the trustee as owner of the trust property; and the instrument, if any, by which the trust is declared is called the "instrument of trust";
>
> "breach of trust"- A breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a "breach of trust";
>
> "registered", expressions defined in Act 9 of 1872 – And in this Act, unless there be something repugnant in the subject context, "registered" means registered under the law for the registration of documents for the time being in force; a person is said to have "notice" of a fact either when he actually knows that fact or when, but for wilful abstention from inquiry or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent, under the circumstances mentioned in the Indian Contract Act, 1872, section 229 and all expressions used herein and defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respective attributed to them by that Act."
>
> 5. Trust of immovable property -No trust in relation to immoveable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.
>
> Trust of moveable property- No trust relating to movable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.
>
> These rules do not apply where they would operate so as to effectuate a fraud."

21. We have considered the submissions and find no merit in the same. *Firstly*, Section 3 of the Act is only in the nature of interpretation-clause and nothing more. *Secondly*, we found that the founders of the trust have donated their properties to the trust as the previous trust had a different entity and its property could not have been taken over by the new trust and treated as their own corpus. *Thirdly*, even the allegations of camouflage are totally unsubstantiated. *Fourthly*, the petitioner has failed to prove how the trust has been created contrary to the provisions of the Indian Trusts Act. *Fifthly*, the provisions of Section 5 of the Act are relevant to only to the stage of inception or establishment of trust and not to any subsequent stage; And *lastly*, respondent trust is a public trust as contra-distinguished from a private trust, hence, the provisions of Indian Trusts Act are not applicable to public trust.

22. It is next contended by Mr. Sanjeev Bhushan, learned Senior Advocate, that respondent No. 5, who was then the Chief Minister by exercising influence, got huge chunk of land measuring 99 hectares, leased in favour of the trust at the rate of Rs. 1/- per year for 99 years. Not only this, all the formalities were completed within a period of six months and ultimately the lease deed between the government and the trust was signed on 03.03.2001.

23. We again find no merit in this contention. The mere fact that the authorities have done the work with requisite promptitude cannot be a ground to casts suspicion on the working of the respondents.

24. As regards the grant of lease, the same has duly been explained in the reply filed by the CSIR (supra). We do not find any "*hanky panky*", as is alleged by the petitioner in the execution of the lease deed, more particularly, when the NBRI has given land to different parties like H.P. Krishi Vishwavidalaya presently known as CSK H. P. Krishi Viswavidalaya, Palampur, H.P. Housing Board and Kendriya Vidalaya etc.

25. In addition to the above, we find the stand of the petitioner to be suspicious and not above board because in case the government would have granted lease on the market value, obviously, the cost of the lease alone would runs into several lacs/crores, making it difficult for the trust to extend the facility of multi specialty hospital to the poor, BPL and Antodaya people.

26. Learned counsel for the petitioner would then claim that the government in order to help the trust have illegally changed the entry of the land from Tea Garden to "Banjar Qadim" over night.

27. Even this contention is without merit. The 5th respondent was nowhere in picture when the correction was carried out, as it had not even been founded on that date. This belated challenge after more than two decades of correction, that too, in absence of any

procedural or legal infirmity and after the land(s) having been transferred to various Universities, Boards etc. cannot be countenanced.

28. Now adverting to the last contention of the learned counsel for the petitioner that out of 15 trustees, 9 belong to the business family of the Jai Parkash group. We really do not find how that itself can affect the legal character of the trust. Learned counsel for the petitioner has failed to point out any provisions of the Indian Trusts Act or any other law which bars members of business family from becoming members of a trust.

29. Noticeably, it was pursuant to memorandum of understanding with Jai Parkash Seva Sansthan, the nominees have been inducted in the trust against the existing vacancies and some in place of other trustees, itself has not changed the character of the trust into a commercial one. It is on account of the finances that were made available, that the trust could expand its activities and set up a super speciality hospital with an Associated Medical College and Nursing College, as stated in the reply filed by the fourth respondent.

30. We may at this stage notice that when the case was taken up by this Court on 14.04.2019, the petitioner again made a submission that after transfer of the land to the Trust, no actual hospital has been set up at the spot, constraining this Court to pass the following orders:-

> "Since a stand is being taken on behalf of the petitioner that after transfer of the land to the Trust, no actual hospital has been set up at the spot and such a stand is being strenuously disputed by the respondents, let the Health Department, Himachal Pradesh, file a latest status report with regard to the infrastructure of the hospital and the facilities created, especially for the common men/residents of Himachal Pradesh. The photographs of the hospital and its infrastructure, if any, be also placed on record."

31. In compliance to the aforesaid order, the official respondents filed a status report on the affidavit of the Special Secretary (Health), the relevant portion whereof, reads as under:-

> a. That it is submitted respectfully that the Vivekananda Medical Research Trust (VMRT), Palampur was registered as Trust on 10.09.2000. It is submitted further that for the construction and commission of two health institutions i.e. Kaya Kalap and Hospital Vivekananda Medical Institute, the Trust generated resources through generous public donations. A 90 bedded (Ayush Hospital Kayakalp) was constructed with about 14,638 sq. feet area in the year, 2005. The hospital is serving general public through nature care, Panchkarma, Physiotherapy, Yoga, Acupressure, Megneto-Therapy and Meditation etc. This hospital is the only NABH (National Accredition Board for Hospitals & Health Care Providers) Accredited Ayush Hospital in the State of Himachal Pradesh and is also ISO 9001/2015 institution. This institution has already served more than 30,000 patients. Apart from this, hospital offers

rebate and facility to Antodaya, BPL and Senior citizens by providing them discounted treatment. The details of Kayakalp-Ayush Hospital is as under:-

Sr. No.	Description	Detail
1	Total area of construction	Approximately 14,638 sq. feet
2	Year of commencement of operation	1.11.2005
3	Total No. of functional beds	90
4	Total No. of operation specialists and their names.	5-Naturopathy, Panchkarma, Physiotherapy, Yoga, Meditation
5	Total No. of Doctors.	07
6	Total No. of Therapist	28
7	Total No. of other staff	49
8	Average No. of OPD/Day	15/day
9	Average No. of IPD/Day	40/Day
10	Approximate No. of patients served till date.	32200
11	No. of BPL benefitted till date	20
12	No. of Antodaya benefitted till date	138
13	No. of Sr. Citizens benefitted till date	6383
14	No. of free camps organised till date	34
15	Award/appreciations	Best Yoga & Naturopathy Research Institute of the year 2015 by health care excellence summit and ISO 2015 certified organisation and also NABH Accredited Ayush Hospital.

b. That it is submitted respectfully that a Multi Speciality Hospital was also started by the Vivekananda Medical Research Trust in the year, 2012 with a construction area of 1,78,917 sq. feet. This is providing 17 operational facilities including ICU, NICU and Spinal Surgery facility. This multi speciality hospital

has already benefitted more than one lac patients and 21,738 surgeries have been performed till date. This hospital has provided treatment on discount to about 18,000 patients belonging to BPL and Antodaya categories.

c. That the staff details of Vivekananda Medical Institution is as under:

CONSULTANTS	i. Internal Medicine & Critical Care ii. Nurosurgery iii. Padetrics and Neonatology iv. Anesthesia & Critical Care v. Orthopaedetics & Joint Replacement vi. Obstratics & Gynaecology vii. General & Leproscopic Surgery viii. Radiology & Imaging ix. Non Evasive Cardiology x. Dental xi. Opthamology xii. Casual Medical Officers xiii Physician Assistant	03 01 02 02 01 02 02 01 01 03 01 02 10
PARA MEDICAL STAFF	i. Dialysis Technician ii. OT Technical iii. Radiology Technician iv. Lab Technician v. Physiotherapist vi. Dietetics	02 03 05 05 02 02
NURSING STAFF		78
NON-CLINICAL STAFF	i. Hospital Operation ii. HR iii. Front Office iv. Finance & Control v. BMS vi. food & Beverages vii. BME	02 02 12 03 01 01 01
OUTSOURCE STAFF	I. GDA/House Keeping/Security/Gardner/ Mess/Electrician/Plumber	95
TOTAL		295

In addition to above, the details of infrastructure/staff in VMI Multi-speciality Hospital, is as under:-

Sr. No.	DESCRIPTION	DETAIL
i	Total area of construction	Approximately 1,78,917 sq. feet

ii	Tear of commencement.	23rd July, 2012
iii	Total number of functional beds	57
iv	Total number of operation specialities and their names	17 (Internal Medicines & Critical Care, General & Leproscopic Surgery, Neuro & spine Surgery, Orthopaedics & Joint Replacement, Pedatrics & Neonotology, Obstracs & Gynecology, Dental Care, Non Invasive Cardiology, Opthalmology, Radio diagnosis, Anesthesia, Urology, dialysis, Dietectics and Nutrition, Laboratory Medicines, Rehumatology.
v	Total number of specialists	17
vi	Total number of Medical & other staff	13+111
vii	Total number of other staff	80
viii	Average No. of OPD/Day	115 to 120/day
ix	Average No. of IPD per day	35/day
x	Approximate No. of patients served till date	1,36,096
xi	No. of BPL benefitted till date	About 9000
xii	No. of Antodaya benefitted till date	About 9000
xiii	No. of Senior Citizens till date	
xiv	No. of Free camps organised till date	More than 300
xv	Special mentions/facilities that are extended by VMI but are not available in near vicinity of Palampur	
xvi	Total No. of surgery performed till date	Approximately 21, 738

d. That in compliance to the directions of this Hon'ble Court the photographs of the Hospital and its infrastructure has also been obtained through Chief Medical Officer, Kangra which are voluminous and as such, a complete Album thereof will be produced before this Hon'ble Court at the time of taking up this

> case. However, the copies of few photographs are appended with this status report as Annexure R-1 (Colly).
> 3. That in view of the report submitted by the Chief Medical Officer, Kangra at Dharamshala, it is clear that Vivekananda Medical Institute and Ayush Kayakalap are rendering good medical and allied services to the people.

32. Noticeably, the petitioner made no endeavour to controvert or rebut the contents of this affidavit.

33. We have deliberately referred to the pleadings of the parties in extenso so as to enable us to come to the conclusion whether the petitioner has filed the instant petition in the larger public interest.

34. We may observe that there is no material whatsoever placed on record by the petitioner whereby it can be inferred that he is a *probono publico* or that the petition has in fact been filed in public interest. Rather, if one would go through the entire petition, it would be evident that the element of public interest is conspicuously absent.

35. What we can, therefore, prima facie, infer is that the petition has been set up as a dummy and the petitioner has, therefore, indulged in public mischief for oblique motive and in such circumstances the Court has to act ruthlessly while dealing with such imposters, busybody and meddlesome interlopers impersonating as public spirited holy men. The petitioner cannot masquerade as crusader of justice and is only pretending to act in the name of *probono publico,* though he has no interest in the public to protect. The instant petition has been filed under ploy for achieving oblique motives.

36. It is more than settled that merely because a petition is styled as a "***Public Interest Litigation***" but in fact is nothing more than a camouflage to foster personal disputes or vendetta and the petitioner in fact is a proxy litigant the same cannot be regarded as a Public Interest Litigation. There has to be a real and genuine public interest involved in a litigation and there must be concrete and credible basis for maintaining a cause before the Court and not merely an adventure of knight errant borne out of wishful thinking. Only a person acting bonafide and having sufficient interest in the proceedings of PIL will alone have a locus-standi and can approach the Court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not a person(s) for personal gain or private profit or any other oblique consideration.

37. Public Interest Litigation is a weapon which has to be used with great care and circumspection and the Judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or public interest seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens.

38. The attractive brand name of Public Interest Litigation cannot be allowed to be used for suspicious products of mischief. This has so been held by the Hon'ble Supreme Court in its various pronouncements and the same have been repeatedly reiterated and followed by this Court in a batch of writ petitions, ***CWP No.7249/2010 titled 'Devinder Chauhan Jaita versus State of Himachal Pradesh and others***', being lead case, decided on 03.12.2014, another batch of writ petitions, ***CWP No.9480/2014 titled 'Vijay Kumar Gupta versus State of Himachal Pradesh and others***', being the lead case, decided on 09.01.2015**,** ***CWP No.2775/2015 titled 'Anurag Sharma and another versus State of Himachal Pradesh and others***', decided on 07.07.2015, ***CWP No.328 of 2016 titled 'Lala Ram and others versus State of H.P. and others***, decided on 01.03.2016, ***CWP No.4838 of 2015 titled 'Ali Mohammed versus State of H.P. and others***, decided on 16.03.2016, ***CWP No.4240 of 2015 titled 'Om Prakash Sharma versus State of H.P. and others***, decided on 19.04.2016 and ***CWP No.3131 of 2014, titled 'Dr.J.S.Chauhan versus State of H.P. and others***, decided on 06.05.2016.

39. The issue regarding public interest litigation has elaborately been dealt with by this Court in CWP No.9480 of 2014, titled 'Vijay Kumar Gupta versus State of H.P. and others, decided on 09.01.2015 (supra) and after taking into consideration the entire law on this subject this Court laid down the following parameters for permitting litigation in public interest:-

> "29. From the aforesaid exposition of law, it can safely be concluded that the Court would allow litigation in public interest only if it is found:-
>
> (i) That the impugned action is violative of any of the rights enshrined in Part III of the Constitution of India or any other legal right and relief is sought for its enforcement;
>
> (ii) That the action complained of is palpably illegal or malafide and affects the group of persons who are not in a position to protect their own interest or on account of poverty, incapacity or ignorance;
>
> (iii) That the person or a group of persons were approaching the Court in public interest for redressal of public injury arising from the breach of public duty or from violation of some provision of the Constitutional law;
>
> (iv) That such person or group of persons is not a busy body or a meddlesome inter-loper and have not approached with mala fide intention of vindicating their personal vengeance or grievance;
>
> (v) That the process of public interest litigation was not being abused by politicians or other busy bodies for political or unrelated objective. Every default on the part of the State or Public Authority being not justiciable in such litigation;
>
> (vi) That the litigation initiated in public interest was such that if not remedied or prevented would weaken the faith of the common man

in the institution of the judicial and the democratic set up of the country;

(vii) That the State action was being tried to be covered under the carpet and intended to be thrown out on technicalities;

(viii) Public interest litigation may be initiated either upon a petition filed or on the basis of a letter or other information received but upon satisfaction that the information laid before the Court was of such a nature which required examination;

(ix) That the person approaching the Court has come with clean hands, clean heart and clean objectives;

(x) That before taking any action in public interest the Court must be satisfied that its forum was not being misused by any unscrupulous litigant, politicians, busy body or persons of groups with mala fide objective or either for vindication of their personal grievance or by resorting to black-mailing or considerations extraneous to public interest."

40. The concept of a public interest litigation and its object was explained by three Hon'ble Judges' Bench of the Hon'ble Supreme Court in ***Jaipur Shahar Hindu Vikas Samiti*** *vs.* ***State of Rajasthan and others (2014) 5 SCC 530*** wherein it was observed as under:

"49. The concept of Public Interest Litigation is a phenomenon which is evolved to bring justice to the reach of people who are handicapped by ignorance, indigence, illiteracy and other down trodden people. Through the Public Interest Litigation, the cause of several people who are not able to approach the Court is espoused. In the guise of Public Interest Litigation, we are coming across several cases where it is exploited for the benefit of certain individuals. The Courts have to be very cautious and careful while entertaining Public Interest Litigation. The Judiciary should deal with the misuse of Public Interest Litigation with iron hand. If the Public Interest Litigation is permitted to be misused the very purpose for which it is conceived, namely to come to the rescue of the poor and down trodden will be defeated. The Courts should discourage the unjustified litigants at the initial stage itself and the person who misuses the forum should be made accountable for it. In the realm of Public Interest Litigation, the Courts while protecting the larger public interest involved, should at the same time have to look at the effective way in which the relief can be granted to the people, whose rights are adversely affected or at stake. When their interest can be protected and the controversy or the dispute can be adjudicated by a mechanism created under a particular statute, the parties should be relegated to the appropriate forum, instead of entertaining the writ petition filed as Public Interest Litigation."

41. To similar effect is another judgment of the Hon'ble Supreme Court in ***Environment and Consumer Protection Foundation*** *vs.* ***Union of India and others (2017) 16 SCC 780*** wherein it was observed as under:

"29. Why are the Action Plan and these directions necessary? We seem to be forgetting the power of Public Interest Litigation and therefore need to remind ourselves, from time to time, of its efficacy in providing social justice. Many years ago, this Court noted in People's Union for Democratic Rights v. Union of India (1982) 3 SCC 235 that :(SCC p. 240, para 2)

> "2...Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed. That would be destructive of the rule of law which forms one of the essential elements of public interest in any democratic form of Government."

A little later in the judgment, it was said: (SCC pp.242-43, para 3)

> **"3....Millions of persons belonging to the deprived and vulnerable sections of humanity are looking to the courts for improving their life conditions and making basic human rights meaningful for them. They have been crying for justice but their cries have so far been in the wilderness. They have been suffering injustice silently with the patience of a rock, without the strength even to shed any tears."**

30. The advantage of public interest litigation is not only to empower the economically weaker sections of society but also to empower those suffering from social disabilities that may not necessarily of their making. The widows of Vrindavan (and indeed in other ashrams) quite clearly fall in this category of a socially disadvantaged class of our society.

31. Placing empowerment in perspective, this Court noted in State of Uttaranchal v. Balwant Singh Chaufal (2010) 3 SCC 402 that (at SCC p. 427, para 43) the first phase of public interest litigation concerned itself with primarily with the protection of the fundamental rights under Article 21 of the Constitution of "the marginalized groups and sections of the society who because of extreme poverty, illiteracy and ignorance cannot approach this Court or the High Courts." We may add – the socially underprivileged groups. These are the people who have no real access to justice and in that sense are voiceless, and these are the people who need to be empowered and whose cause needs to be championed by those who advocate social justice for the disadvantaged.

32. This recognition formed the basis of the decision of this Court in Delhi Jal Board v. National Campaign for Dignity & Rights of Sewerage & Allied Workers(2011) 8 SCC 568 wherein providing succour to the deprived sections of society was recognized as a "constitutional duty" of

> this Court. Referring to several judgments delivered by this Court, it was observed: (SCC p. 590, para 31)
>
> **"31. These judgments are a complete answer to the appellant's objection to the maintainability of the writ petition filed by Respondent 1.What the High Court has done by entertaining the writ petition and issuing directions for protection of the persons employed to do work** relating to sewage operations is part of its obligation to do justice to the disadvantaged and poor sections of the society. We may add that the superior courts will be failing in their constitutional duty if they decline to entertain petitions filed by genuine social groups, NGOs and social workers for espousing the cause of those who are deprived of the basic rights available to every human being, what to say of fundamental rights guaranteed under the Constitution. It is the duty of the judicial constituent of the State like its political and executive constituents to protect the rights of every citizen and every individual and ensure that everyone is able to live with dignity."

42. It would thus be clear that public interest litigation can only be entertained at the instance of a bonafide litigant and cannot be used by unscrupulous litigants to disguise personal or individual grievance as a public interest litigation. The instant petition fails to qualify the above parameters.

43. It has repeatedly come to the notice not only of this Court, but also the Hon'ble Supreme Court that there is a lot of misuse of public interest litigation, which now is a serious matter of concern for the judicial process.

44. We need not multiply or make reference to a large number of judgments in this regard and reference to a recent judgment of the Hon'ble Supreme Court rendered by three Hon'ble Judges' Bench in this regard shall suffice.

45. In ***Tehseen Poonawalla*** *vs.* ***Union of India and another (2018) 6 SCC 72***, the Hon'ble Supreme Court while dealing with the issue of object of a public interest litigation and its mis-utilization by persons with personal agenda observed as under:

> "**Public Interest Litigation**
>
> 96. Public Interest Litigation has developed as a powerful tool to espouse the cause of the marginalised and oppressed. Indeed, that was the foundation on which public interest jurisdiction was judicially recognised in situations such as those in Bandhua Mukti Morcha v Union of India (1984) 3 SCC 161. Persons who were unable to seek access to the judicial process by reason of their poverty, ignorance or illiteracy are faced with a deprivation of fundamental human rights. Bonded labour and under trials (among others) belong to that category. The hallmark of a public interest petition is that a citizen may approach the court to ventilate the grievance of a person or class of persons who are unable to pursue their rights. Public interest litigation has been entertained by relaxing the rules of standing. The essential aspect of

the procedure is that the person who moves the court has no personal interest in the outcome of the proceedings apart from a general standing as a citizen before the court. This ensures the objectivity of those who pursue the grievance before the court. Environmental jurisprudence has developed around the rubric of public interest petitions. Environmental concerns affect the present generation and the future. Principles such as the polluter pays and the public trust doctrine have evolved during the adjudication of public interest petitions. Over time, public interest litigation has become a powerful instrument to preserve the rule of law and to ensure the accountability of and transparency within structures of governance. Public interest litigation is in that sense a valuable instrument and jurisdictional tool to promote structural due process.

97. Yet over time, it has been realised that this jurisdiction is capable of being and has been brazenly mis-utilised by persons with a personal agenda. At one end of that spectrum are those cases where public interest petitions are motivated by a desire to seek publicity. At the other end of the spectrum are petitions which have been instituted at the behest of business or political rivals to settle scores behind the facade of a public interest litigation. The true face of the litigant behind the façade is seldom unravelled. These concerns are indeed reflected in the judgment of this court in State of Uttaranchal v Balwant Singh Chaufal (2010) 3 SCC 402. Underlining these concerns, this court held thus: (SCC p.453, para 143).

> **"143. Unfortunately, of late, it has been noticed that such an important jurisdiction which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives. We think time has come when genuine and bona fide public interest litigation must be encouraged whereas frivolous public interest litigation should be discouraged. In our considered opinion, we have to protect and preserve this important jurisdiction in the larger interest of the people of this country but we must take effective steps to prevent and cure its abuse on the basis of monetary and non-monetary directions by the courts."**

98. The misuse of public interest litigation is a serious matter of concern for the judicial process. Both this court and the High Courts are flooded with litigation and are burdened by arrears. Frivolous or motivated petitions, ostensibly invoking the public interest detract from the time and attention which courts must devote to genuine causes. This court has a long list of pending cases where the personal liberty of citizens is involved. Those who await trial or the resolution of appeals against orders of conviction

> **have a legitimate expectation of early justice. It is a travesty of justice for the resources of the legal system to be consumed by an avalanche of misdirected petitions purportedly filed in the public interest which, upon due scrutiny, are found to promote a personal, business or political agenda. This has spawned an industry of vested interests in litigation. There is a grave danger that if this state of affairs is allowed to continue, it would seriously denude the efficacy of the judicial system by detracting from the ability of the court to devote its time and resources to cases which legitimately require attention. Worse still, such petitions pose a grave danger to the credibility of the judicial process. This has the propensity of endangering the credibility of other institutions and undermining public faith in democracy and the rule of law. This will happen when the agency of the court is utilised to settle extra-judicial scores. Business rivalries have to be resolved in a competitive market for goods and services. Political rivalries have to be resolved in the great hall of democracy when the electorate votes its representatives in and out of office. Courts resolve disputes about legal rights and entitlements. Courts protect the rule of law. There is a danger that the judicial process will be reduced to a charade, if disputes beyond the ken of legal parameters occupy the judicial space."**

46. The aforesaid observations were relied upon and reiterated by another Hon'ble three Judges' Bench of the Hon'ble Supreme Court in a very recent case in Re: ***Prashant Bhushan and Anr., Suo Motu Contempt Petition (CRL.) No. 1 of 2020, decided on 31.08.2020.***

47. Here we may also note that in compliance to the directions issued by the Hon'ble Supreme Court in ***State of Uttaranchal Vs. Balwant Singh Chaufal (2010) 3 SCC 402,*** this Court vide notification dated 08.04.2010, with a view to preserve the purity and sanctity of Public Interest Litigation and also to keep a check on frivolous letters/petitions has framed Rules known as The Himachal Pradesh High Court Public Interest Litigation Rules, 2010. Rules 3 and 4 thereof read as under:-

> "3. The petitions/complaints/letters and new paper clippings falling under the following categories can be treated under Public Interest Litigation.
>
> (i) Bonded labour matters.
>
> (ii) Neglected children.
>
> (iii) Non-payment of minimum wages to workers and exploitation of casual workers and complaints of violation of Labour Laws (except in individual cases).

Provided that in respect of clauses (i), (ii) and (iii) above, if any of these matters forming the subject matter of the communication relates to one person (as opposed to a group of persons) this cannot be termed as a PIL and can be at best be treated as an individual writ petition.

(iv) Petitions against atrocities on women; in particular harassment of bride, bride burning, rape, murder, kidnapping etc;

(v) Petitions complaining of harassment or torture of villagers by co-villagers or by police in respect of persons belonging to Scheduled Castes and Scheduled Tribes and economically backward classes;

Provided that in respect of clauses (iv) and (v) above if any of these matters of the communication relates to one person (as opposed to a group of persons) this cannot be called as a PIL.

(vi) Petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture antiques, forest and wild life, encroachment of public property and other matters of public importance;

(vii) Petitions from riot-victims; and

(viii) Family pension.

EXPLANATION: The test to treat a communication as PIL is whether any particular communication relates to an individual, if it does, it will be an individual, if it does, it will be an individual's C.W.P. and not a PIL irrespective of the fact whether the individual is complaining of any harassment or any violation of rights, which may also be akin to a group. If, however, the communication relates to a group and it is felt that group cannot defend itself or is not in a position to come to the Court, that would be a PIL warranting interference of the High Court in that PIL.

4. However, no petition involving individual/personal matter shall be entertained as Public Interest Litigation including the matters pertaining to landlord tenant disputes, service matters except concerning pension and gratuity; the petitions for early hearing of cases as well as the petitions concerning maintenance of wives, children and parents."

48. As per Rule 9, the Court before entertaining a Public Interest Litigation shall keep in view the following factors:-

"(i) to verify the credentials of the petitioner;

(ii) satisfaction regarding the correctness of the contents of the petition;

(iii) substantial public interest is involved;

(iv) the petition which involved larger public interest, gravity and urgency must be given priority over other petitions;

(v) to ensure that the PIL is aimed at redressal of genuine public harm or public injury. It shall also be ensured that there is no personal gain, private or oblique motive behind filing the public interest litigation.

(vi) to ensure that the petition filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous consideration."

49. The petition does not even fulfill the criteria as prescribed in the aforesaid Rules and even though the petition is claimed to have been filed in Public Interest Litigation, it does not even qualify to be registered as such and is therefore, not maintainable for the reasons all stated above and for reasons recorded hereinafter also.

50. In addition to the aforesaid, it would be noticed that the Trust in the instant case was registered on 11.09.2000, whereas the petition was filed after a lapse of about 12 years i.e. in the year 2012. What would be the effect of delay and latches and whether such public interest litigation should be entertained, was considered by the Hon'ble Supreme Court in ***R & M Trust v. Koramangala Residents Vigilance Group (2005) 3 SCC 91***, wherein at paragraphs 23 and 24, it was observed as follows:-

> 23. Next question is whether such Public Interest Litigation should at all be entertained & laches thereon. This sacrosanct jurisdiction of Public Interest Litigation should be invoked very sparingly and in favour of vigilant litigant and not for the persons who invoke this jurisdiction for the sake of publicity or for the purpose of serving their private ends.
>
> 24. Public Interest Litigation is no doubt a very useful handle for redressing the grievances of the people but unfortunately lately it has been abused by some interested persons and it has brought very bad name. Courts should be very very slow in entertaining petitions involving public interest in a very rare cases where public at large stand to suffer. This jurisdiction is meant for the purpose of coming to the rescue of the down trodden and not for the purpose of serving private ends. It has now become common for unscrupulous people to serve their private ends and jeopardize the rights of innocent people so as to wreak vengeance for their personal ends. This has become very handy to the developers and in matters of public contracts. In order to serve their professional rivalry they utilize the service of the innocent people or organization in filing public interest litigation. The Courts are sometimes persuaded to issue certain directions without understanding implication and giving a handle in the hands of the authorities to misuse it. Therefore, the courts should not exercise this jurisdiction lightly but should exercise in a very rare and few cases involving public interest of large number of people who cannot afford litigation and are made to suffer at the hands of the authorities.

The parameters have already been laid down in a decision of this Court in the case of Balco Employees' Union (Regd.) v. Union of India & Ors. reported in (2002) 2 SCC 333, wherein this Court has issued guidelines as to what kind of public interest litigation should be entertained and all the previous cases were reviewed by ".

77. Public Interest litigation, or PIL as it is more commonly known, entered the Indian Judicial process in 1970. It will not be incorrect to say that it is primarily the Judges who have innovated this type of litigation as there was a dire need for it. At that stage, it was intended to vindicate public interest where fundamental and other rights of the people who were poor, ignorant or in socially or economically disadvantageous position and were unable to seek legal redress were required to be espoused. PIL was not meant to be adversarial in nature and was to be a cooperative and collaborative effort of the parties and the court so as to secure justice for the poor and the weaker sections of the community who were not in a position to protect their own interests. Public interest litigation was intended to means nothing more than what words themselves said viz. "litigation in the interest of the public".

78.While PIL initially was invoked mostly in cases connected with the relief to the people and the weaker sections of the society and in areas where there was violation of human rights under Article 21, but with the passage of time, petitions have been entertained in other spheres, Prof. S.B. Sathe has summarized the extent of the jurisdiction which has now been exercised in the following words::

"PIL may, therefore, be described as satisfying one or more of the following parameters. These are not exclusive but merely descriptive;

- Where the concerns underlying a petition are not individualist but are shared widely by a large number of people (bonded labour, undertrial prisoners, prison inmates.)
- Where the affected persons belong to the disadvantaged sections of society (women, children, bonded labour, unorganized labour, etc.)
- Where judicial law making is necessary to avoid exploitation (inter-country adoption, the education of the children, bonded labour, unorganized labour, etc.)
- Where judicial law making is necessary to avoid exploitation (inter-country adoption, the education of the children of the prostitutes).
- Where judicial intervention is necessary for the protection of the sanctity of democratic institutions (independence of the judiciary, existence of grievances redressal forums.)
- Where administrative decisions related to development are harmful to the environment and jeopardize people's right to natural resources such as air or water."

> 79. There is, in recent years, a feeling which is not without any foundation that public interest litigation is now tending to become publicity interest litigation or private interest litigation and has a tendency to be counterproductive.
>
> 80. PIL is not a pill or a panacea for all wrongs. It was essentially meant to protect basic human rights of the weak and the disadvantaged and was a procedure which was innovated where a public spirited person files a petition in effect on behalf of such persons who on account of poverty, helplessness or economic and social disabilities could not approach the Court for relief. There has been in recent times, increasingly instances of abuse of PIL. Therefore, there is a need; to reemphasize the parameters within which PIL can be resorted to by petitioner and entertained by the Court. This aspect has come up for consideration before this Court and all we need to do is to recapitulate and reemphasize the same."

51. It would thus be evident from the aforesaid discussion that the petitioner has not approached this Court with clean hands. This Court in exercise of its extraordinary jurisdiction is a Court of equity and any person approaching is expected not only to act with clean hands but also with clean mind, clean heart and with clean objective. He who seeks equity must do equity. The judicial process cannot become an instrument of oppression or abuse or a means in the process of Court to subvert justice for the reasons that the Courts exercise jurisdiction only in furtherance of justice. The interest of justice and public interest coalesce and therefore, they are very often one and the same.

52. It is of utmost importance that those who invoke this Court's jurisdiction seeking waiver of the *locus standi* rule must exercise restraint in moving the Court by not plunging in areas wherein they are not well-versed. Such a litigant must not succumb to spasmodic sentiments and behave like a knight errant roaming at will in pursuit of issues providing publicity. He must remember that as a person seeking to espouse a public cause, he owes it to the public as well as to the court that he does not rush to court without undertaking a research, even if he is qualified or competent to raise the issue. Besides, it must be remembered that a good cause can be lost if petitions are filed on half-baked information without proper research or by persons who are not qualified and competent to raise such issues as the rejection of such a petition may affect third party rights. Lastly, it must also be borne in mind that no one has a right to the waiver of the locus standi rule and the court should permit it only when it is satisfied that the carriage of proceedings is in the competent hands of a person who is genuinely concerned in public interest and is not moved by other extraneous considerations. So also the court must be careful to ensure that the process of the Court is not sought to be abused by a person who desires to persist with his point of view, almost carrying it to the point of obstinacy (Ref:- ***S.P. Anand vs. H. D. Deve Gowda, (1996) 6 SCC 734***).

53. The petitioner seeks publicity and has filed this petition with an ulterior motive to settle scores with the 5th respondent.

54. The petitioner has indulged in leveling wild and reckless allegations besmirching the character of others, more particularly, respondent No. 5 who, as per the petitioner himself, happens to be the former Chief Minister of the State of Himachal Pradesh and also the former Union Cabinet Minister.

55. Moreover, as observed above, there is no explanation for the delay and latches and above all the petitioner has not chosen to controvert the stand of the respondents taken in the reply(ies), by filing rejoinder(s).

56. Lastly and more importantly, the status report filed by the Special Secretary (Health) in compliance to the order passed by this Court on 14.04.2019, which again has gone unrebutted, falsifies the claim of the petitioner and is a clear indicator that the petitioner has abused the process of the Court.

57. In view of the aforesaid discussion not only is there no merit in this petition, but the same is also mischievous and has only resulted in wastage of precious Court's time. Even the respondents have unnecessarily been dragged into an otherwise avoidable litigation.

58. Accordingly, this petition is dismissed with costs of Rs.1,00,000/- out of which Rs.50,000/- will be paid by the petitioner to the 4th and 5th respondents in equal share while the remaining amount of Rs.50,000/- will be deposited in the account of H.P. High Court Bar Association Welfare Fund within a period of two months from today. Pending application(s), if any, also stands disposed of.

For compliance to come up on **18.12.2020**.

BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, JUDGE

Kishori Lal and others .....Petitioners

Versus

Smt. Lajwanti and others ...Respondents

CMPMO No. 346 of 2020
Decided on: September 28, 2020

Code of Civil Procedure, 1908-Order 39 Rules 1 & 2 plaintiff filed a civil suit- Seeking relief of permanent prohibitory injunction – an application seeking interim relief was filed, which was dismissal by the trial court- An appeal was filed which was also dismissed- Held a party seeking relief is not only recorded to establish prima facia case but also irreparably loss and injury which may be caused in case of denial of grant of relief- While deciding balance of convenience,

court is remained to weigh protection of plaintiff right- Against need for protection of defendant' right or infringement of right- Petition dismissed.

Cases referred:

M/S Gujarat Bottling Co.Ltd. & Ors. v. The Coca Cola Co. & Ors., AIR 1995 2372;
Mahadeo Savlaram Shelke v. The Puna Municpal Corpn., J.T. 1995(2) S.C. 504;
Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719;

For the petitioners: Mr. Naresh K. Sharma, Advocate, through video-conferencing.
For the respondents: Nemo.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant petition filed under Art. 227 of the Constitution of India, lays challenge to judgment dated 20.7.2020 passed by learned Additional District Judge, Hamirpur (HP) in Civil Misc. Appeal no. 3 of 2020, affirming order dated 13.3.2020 passed by learned Senior Civil Judge, Nadaun, District Hamirpur, H.P. in C.M.A. No. 95 of 2019, whereby application having been filed by the petitioners-plaintiffs (hereinafter, 'plaintiffs) under Order XXXIX, rules 1 and 2 CPC, praying therein for restraining the respondents/defendant (hereinafter, 'defendants') from raising any construction or changing the nature of suit land i.e. land comprising of Khata No. 42 min, Khatauni No. 42 min Khasra Nos. 454, 455, 456, 457, 458, 459 and 460/2, kita 7, measuring 03-07-70 hectare and Khata No. 72, Khatauni No. 72, Khasra Nos. 399 and 400, Kita 2, measuring 00-03-38 Hectares as per Jamabandi for the years 2010-11, situate in Tikka Dhola Kuwal, Mauza Jassai, Tehsil Nadaun, District Hamirpur, Himachal Pradesh (hereinafter, 'suit land'), came to be dismissed.

25. For having a bird's eye view of the matter, certain undisputed facts as emerge from record are that the plaintiffs filed a civil suit before learned trial Court, seeking therein declaration to the effect that the suit land is an ancestral joint Hindu coparcener property of plaintiffs and defendants Nos. 1 and 2 and they have preferential right qua the suit land and sale deed No. 3/2019, dated 31.2019 in respect of land comprising of Khata No. 42 min, Khatauni No. 42 min Khasra Nos. 454, 455, 456, 457, 458, 459 and 460/2, kita 7, alongwith Tatima and Khasra No. 462, measuring 01-28-79 measuring 03-07-70 hectare, alongwith house of the plaintiffs existing over Khasra No. 457, 458 and 459 and sale deed No. 4/2019, dated 3.1.2019 executed by defendant No.1 in favour of defendants Nos. 3 and 4, subsequent mutations Nos. 178 and 179 dated 10.1.2019 are null and void, alongwith consequential relief of permanent prohibitory injunction, thereby restraining defendants from interfering in any manner in their possession. In the suit, plaintiffs pleaded that the suit land is an ancestral joint Hindu coparcener property of the plaintiffs and defendants Nos. 1 and 2 and they are owner-in-

possession of the suit land and defendants are out of possession. Plaintiffs claimed that since the suit land has been inherited by defendant No.1 from her husband, Prema who himself inherited the same from his father, she had no right, whatsoever, to sell the same to defendants Nos. 3 and 4. Plaintiffs averred in the plaint that husband of defendant No.1, in the Will executed in her favour had written, "*Lajwanti ki tehl sewa ke baad property le sakte hain*." Plaintiffs while claiming that they are maintaining their mother, claimed in the suit that defendant No.1 is an old aged *Pardanasheen* lady and defendant No. 2 taking benefit of her old age, transferred the suit land without their consent and permission. Besides above, plaintiffs claimed in the suit that even otherwise, defendant No.1 was not competent to execute sale deeds as such, sale deeds Nos. 3/2019 and 4/2019, dated 3.1.1999, whereby suit land came to be alienated to defendants Nos. 3 an 4, behind their back, are required to be declared null and void. Plaintiffs claimed that the suit land is a commercial and agricultural land, which abuts Kangoo-Dhaneti road. House, cattle shed, toilet and water tanks of plaintiff No.1 are existing on Khasra Nos. 457, 458 and 459 and he had constructed his house in the year 1974 with the consent of his father and defendant No.1. It is further averred in the plaint that the plaintiffs came to know about sale deeds when defendants Nos. 3 and 4 threatened to dispossess them from the suit land.

26. Aforesaid claim of the plaintiffs came to be resisted by defendant on the ground that the suit land is not ancestral joint Hindu coparcener property of defendants Nos. 1 and 2. Defendants claimed that after execution of sale deeds Nos. 3/2019 and 4/2019, dated 3.1.2019, defendants Nos. 3 and 4 are in possession of suit land. Defendants claimed that defendant No. 1 after having inherited the suit land from her late husband, Prema, sold the same to defendants Nos. 3 and 4. As per defendants, late Prema had inherited the suit land by way of gift deed, which he subsequently bequeathed in favour of defendant No.1 by way of registered deed. Defendants claimed that since plaintiffs are not maintaining defendant No.1 nor are taking care of her, she, of her volition and in a fit state of mind, transferred the suit land in favour of defendants Nos. 3 and 4 for consideration. While denying claim of the plaintiffs that they have preferential right to purchase the property, defendants specifically stated in their written statement that there was no necessity of consent of the plaintiffs. Defendants also denied that the plaintiff No.1 had constructed his house in 1974 with the consent of his father and defendant No.1.

27. Alongwith suit, plaintiffs also filed an application under Order XXXIX, rules 1 and 2 CPC, for grant of ad-interim direction, restraining defendants from raising any construction, changing nature of suit land or alienating the same by way of sale, gift, mortgage etc or creating any charge thereupon.

28. Learned trial Court, on the basis of pleadings adduced on record, dismissed the application and held that the plaintiffs have neither prima facie case in their favour nor balance of convenience lies in their favour and defendants Nos. 3 and 4 being bona fide purchasers for consideration, cannot be retrained from using suit property being lawful owners. Being aggrieved and dissatisfied with aforesaid order passed by learned trial Court, plaintiffs filed an appeal under Order XLIII, rule 1(r) CPC, in the court of learned Additional District Judge, Hamirpur, which also came to be dismissed vide judgment dated 20.7.2020. In the aforesaid background, plaintiffs have approached this Court in the instant proceedings praying therein to quash and set aside aforesaid judgment and order passed by learned Courts below.

29. I have heard learned counsel for the parties and perused the material available on record.

30. It is well settled that before grant of injunction, court must be satisfied that the party praying for relief has a prima facie case and balance of convenience also lies in its favour. While granting injunction, if any, court is required to consider whether the refusal to grant injunction would cause irreparable loss to such a party. Apart from aforesaid well established parameters/ingredients, conduct of the party seeking injunction is also of utmost importance, as has been held by Hon'ble Apex Court in case **M/S Gujarat Bottling Co.Ltd. & Ors.** v. **The Coca Cola Co. & Ors.,** AIR 1995 2372. In case a party seeking injunction fails to make out any of the three ingredients, it would not be entitled to injunction. Hon'ble Apex Court in case **Mahadeo Savlaram Shelke** v. **The Puna Municpal Corpn.,** J.T. 1995(2) S.C. 504 relying upon its earlier judgment in **Dalpat Kumar** v. **Prahlad Singh**, (1992) 1 SCC 719 has aptly interpreted phrases, “prima facie case”, “balance of convenience” and “irreparable loss”. Hon'ble Apex Court has observed in the judgment (supra) that the phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of justice. The court would be circumspect before granting the injunction and look to the conduct of the party, the probable injury to either party and whether the plaintiff could be adequately compensated if injunction is refused. The existence of prima facie right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except

one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury but means only that the Injury must be a material one, namely one that cannot be adequately compensated by way of damages. The balance of convenience must be in favour of granting injunction. The court while granting or refusing injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Hon'ble Apex Court has held as under:

> "...the phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of justice. The court would be circumspect before granting the injunction and look to the conduct of the party, the probable injury to either party and whether the plaintiff could be adequately compensated if injunction is refused. The existence of prima fade right and infraction of the enjoyment of him property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury but means only that the Injury must be a material one, namely one that cannot be adequately compensated by way of damages. The balance of convenience must be in favour of granting injunction. The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury

and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. The court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

31. Though, the documents taken into consideration by learned Courts below, reveal that the suit land in Khata No. 42, is exclusively owned and possessed by defendant No.1 and the land in Khata No. 72 is jointly owned and possessed by defendant No.1 alongwith other co-sharers namely Ram Swaroop, Kanti Devi etc. Similarly, it is also not in dispute that earlier the suit land was owned and possessed by husband of defendant No. 1, Prema, but he bequeathed the same in favour of defendant No.1, by way of Will No. 144, dated 2.7.1997, since sons of Prema were not looking after their parents and it is stipulated in the Will that if they will look after and serve defendant No.1, they will be entitled to get the property from their mother. Defendant No.1 sold out entire suit property to defendants Nos. 3 and 4, through sale deeds Nos. 3/2019 and 4/2019 on the basis of which mutations Nos. 178 and 179 came to be attested in favour of defendants No. 3 and 4. Aforesaid sale deeds have been laid challenge on the ground that defendant No.1 is not competent to sell suit property in favour of defendants Nos. 3 and 4, same being ancestral joint Hindu coparcener property. Documentary evidence on record, clearly reveals that the suit land was inherited by defendant No.1 through Will and as such, suit land lost its character of joint Hindu coparcener property, rather, it became absolute property of defendant No.1 by virtue of provisions underlying S.14 of Hindu Succession Act as such, there is no merit in the claim of the plaintiffs that the suit land is a joint Hindu coparcener property and defendant No.1 has no right to sell out the same without legal necessity.

32. Leaving everything aside, this Court finds from record that defendant No.1 is still alive and has categorically stated that she has willfully sold out suit land to defendants Nos. 3 and 4 through sale deeds Nos. 3/2019 and 4/2019 and mutations Nos. 178 and 179 have been attested in favour of defendants Nos. 3 and 4. Since there is no dispute qua execution of Will in favour of defendant No.1 sale, if any, made on the strength of same, by defendant No.1 of suit property cannot be laid challenge, especially when defendant No.1 has herself admitted the factum with regard to sale of suit property by her in favour of defendants Nos. 3 and 4. Once defendant No.1 became exclusive owner-in-possession of suit land, after having inherited the same through Will, she is well within her right to deal with the same, as per her sweet will, as such, plaintiffs cannot claim preferential right to purchase the same.

33. Mr. Naresh Sharma, learned Counsel appearing for the plaintiff argued that the house of plaintiff No.1 is situate over the suit land, which fact is evident from documents/photographs placed on record. He further argued that as per information obtained from Revenue Department under Right to Information Act, house of plaintiff No.1 is existing over suit land. He further contended that since the plaintiffs are maintaining their mother, defendant No.1, she could not have sold suit property, as has been clearly stipulated in the Will that in case defendant No.1 is maintained by the plaintiffs, they will get the property.

34. This Court finds no merit in the aforesaid submission of learned Counsel appearing for the plaintiffs because bare perusal of copies of Jamabandis for the years 1982-93 and 2010-2011, reveal that part of suit land comprising of Khasra No. 454, 455, 456, 457, 458, 459 and 460 was owned and possessed by Prema, husband of defendant No.1 and same subsequently came to be inherited by defendant No.1, Lajwanti. Perusal of Jamabandis as referred to above, further reveals that land comprised in Khasra Nos. 399 and 400 was jointly owned and possessed by defendant No.1 alongwith others. As per recital in the Will dated 2.7.1997, placed on record by plaintiffs, late Prema was having one daughter and four sons, besides his wife and he had executed Will since his sons were not serving him and his wife. He bequeathed entire property in favour of his wife, who, after having become absolute owner of the part of suit land, transferred the same to defendants Nos. 3 and 4, for considerations of Rs.30.00 Lakh and Rs.10.00 Lakh, respectively. No material worth credence has been placed on record by plaintiffs suggestive of the fact that husband of defendant No.1, Prema, had inherited suit land from his ancestors but even if it is assumed that suit land was ancestral in the hands of late Prema, it lost character of ancestral property after having been inherited by defendant No.1 from Prema by way of Will. There is no dispute that plaintiffs have not challenged Will in the present case and as such, they have no right, title or interest over the same.

35. With a view to prove possession over suit land, plaintiffs produced receipts, house taxes receipts, electricity bills, copies of bills issued by I&PH Department in the name of plaintiff No.1 but learned Courts below after having scanned aforesaid document, have recorded that the bills/receipts and even site plan placed on record by plaintiffs, nowhere prove that plaintiff No.1 has constructed any house over the suit land. Though, plaintiff No.1 claimed that he has received information under Right to Information Act that his house is situate over suit land, but aforesaid information never came to be placed on record. Perusal of the Jamabandi as well as copies of sale deeds placed on record clearly prove that defendants Nos. 3 and 4 are in possession of suit land. Since plaintiffs are not recorded as owners of suit land, they cannot be said to have any prima facie case in their favour nor balance of convenience lies in their favour, as such, this Court finds no illegality or perversity in the judgment and order passed by learned

Courts below, which otherwise appear to have been based on proper appreciation of the evidence, be it ocular or documentary.

36. Consequently, in view of above, judgment and order passed by learned Court below are upheld. The petition at hand stands dismissed alongwith all pending applications.

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

ICICI Lombard General Insurance Company Limited

..Appellant

Versus

Smt. Indira Devi and others .....Respondents

FAO(MVA) No. 235 of 2015
Decided on: July 20, 2020

Motor Vehicle Act, 1988- Section 166- No specific evidence regarding income of deceased- His monthly income assessed taking in to consideration and his wages present in the State of H.P a the relevant time- Instead of Addition 50% as held by the tribunal only addition of 40% would be made to his established income if person is self employed and age is less than 40 years while assessing less of dependency – Award modified.

Cases referred:
National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680;
Rajesh and others v. Rajbir Singh and others, 2013 SAR (Civil) 594;
Ranjana Prakash and others vs. Divisional Manager and another (2011) 14 SCC 639;
Reliance General Insurance Co. Ltd. v. Shalu Sharma, (2018) 2 SCC 753;

For the appellant : Mr. Jagdish Thakur, Advocate.

For the respondents : Mr. Sudhir Thakur, Senior Advocate with Mr. Karun Negi, Advocate, for respondents Nos. 1 to 6.
Mr. B.C. Verma, Advocate, for respondent No. 7.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant appeal filed under S.173 of the Motor Vehicles Act lays challenge to Award dated 16.6.2014 passed by learned Motor Accident Claims Tribunal-II, Solan, District Solan, Himachal Pradesh in MAC Petition No. 22-S/2 of 2011, whereby claim petition having been filed by respondents Nos. 1 to 6-petitioners (hereinafter, 'claimants') has been allowed and appellant-Insurance Company has been saddled with liability to pay compensation to the tune of Rs.10,97,000/- to claimants Nos. 1 to 3 only, alongwith interest at the rate of 7.5% per annum from the date of filing of the petition till the date of realisation as also costs of Rs.3,000/-.

89. For having bird's eye of the matter, certain undisputed facts which may be relevant for the adjudication of the appeal at hand, are that the claimants preferred a claim petition under S.166 of the Motor Vehicles Act, praying therein for compensation to the tune of Rs.25,00,000/-, on account of death of Sushil Kumar, who died in a motor accident. On 26.9.2011 at 11.15 am, vehicle bearing registration No. HP-63-3632 being driven by respondent No.7, who was also owner of the said vehicle, met with an accident, as a consequence of which, Sushil Kumar, who at the relevant time was traveling in the vehicle in question as owner of the goods, suffered multiple injuries. Initially, the above named deceased was taken to Regional Hospital, Solan, and thereafter was referred firstly to IGMC Shimla and then to PGI Chandigarh, where he remained admitted from 27.9.2011 to 5.10.2011 and unfortunately, succumbed to his injuries on 5.10.2011. In the aforesaid background, claimants filed the claim petition before learned Tribunal below.

90. Aforesaid claim petition came to be contested by respondent No.7 (respondent No.1 before learned Tribunal below), who is driver-cum-owner of the vehicle, on the ground that since claimants Nos. 4 to 6 were not dependent upon the deceased, petition on their behalf is not maintainable. Respondent No.7 also stated in his reply that claimant No.4-Sher Singh was in receipt of salary being employee of HPSEB. Besides above respondent No.7 also claimed in the reply that claimants Nos. 5 and 6 being brother and sister of the deceased are not his legal heirs and also not dependent on the income of the deceased, as such, they are also not entitled to file the claim petition. Interestingly, respondent No.1 in his reply, though pleaded that the deceased was not regularly engaged in the business of vegetables but admitted that he used to do such business off and on. Respondent No. 7 specifically denied the allegation of rash and negligent driving on his part, on the date of alleged accident and claimed that the accident took place on account of sudden failure of brake system.

91. Appellant-Insurance Company refuted the claim on the ground that since the vehicle in question was being plied by respondent No.7 without there being valid and effective driving licence, it is not liable to indemnify the insured. Apart from above, appellant-Insurance Company also claimed before learned Tribunal below that since the deceased was traveling in the vehicle as a gratuitous/unauthorized passenger, appellant-Insurance Company cannot be held liable to pay any compensation.

92. On the basis of pleadings of the parties, learned Tribunal below framed following issued on 21.12.2012:

> "Issue No.1 Whether Sh. Sushil Kumar died in a motor vehicle accident which took place on 26.09.2011 at about 1.15 a.m. near Panch Parmeshar Mandir, Deonghan, Solan, due to rash and negligent driving of vehicle No HP-63-3632 being driven by respondent No.1?OPP

Issue No.2	If issue No. 1 is proved in affirmative, whether the petitioners are entitled for the grant of compensation, if so, to what amount and from which of the respondents? OPP
Issue No.3	Whether the driver of the offending vehicle was not holding a valid and effective driving licence. At the time of accident? OPR-2.
Issue No. 4	Whether the deceased was traveling in the offending vehicle as gratuitous/unauthorized passenger, as allege? OPR-2.
Issue No.5	Relief"

93. Learned Tribunal below, vide Award dated 16.6.2014, held the claimants Nos. 1 to 3 only entitled to the compensation in the sum of Rs.10,97,000/- alongwith interest at the rate of 7.5% per annum from the date of filing of the petition till deposit of the award amount alongwith costs of Rs.3,000/-. Vide aforesaid award, though learned Tribunal below held that the accident occurred due to rash and negligent driving on the part of respondent No.7, but since the vehicle was insured at the relevant time with the appellant-Insurance Company, it is the liability of the appellant-Insurance Company to pay the compensation. In the aforesaid background, appellant-Insurance Company has approached this Court in the instant proceedings, praying therein to set aside the Award.

94. I have heard learned counsel for the parties and perused the material available on record.

95. Having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning assigned by learned Tribunal below in the impugned award, this Court finds that mainly challenge has been laid by the appellant-Insurance Company to the quantum of compensation awarded by learned Tribunal below. Mr. Jagdish Thakur, learned Counsel appearing for the appellant-Insurance Company, while making this Court peruse the evidence led on record by respective parties vis-à-vis reasoning assigned by learned Tribunal below qua issue No.4, contended that once claimants were not able to place on record, document, if any, qua the income of the deceased, learned Tribunal below ought not have assessed the income of the deceased at Rs.4500/- per month. Mr. Thakur contended that though in the case at hand, claimants claimed that the deceased was earning Rs.30,000/- per month, but neither any Income Tax Returns nor any bills, suggestive of the fact that deceased was earning the aforesaid sum by sale/purchase of vegetables, ever came to be placed on record, as such, learned Tribunal below, while determining monthly income of the deceased, ought to have taken into consideration minimum wages payable to the daily wagers in the agriculture sector. Mr. Thakur, contended that with effect from October 1, 2011, minimum wages of daily wagers employed in agricultural sector were Rs.120/- per month, as such, total monthly income of the deceased could be said to be Rs.3600/- and not Rs.4500/- per month.

Apart from above, Mr. Thakur also contended that since Shri Surya Deep Thakur, RW-2, categorically deposed before learned Tribunal below that at the relevant time, vehicle was not loaded with any goods nor any recovery memo showing anything loaded has been prepared in criminal case , learned Tribunal below erred in concluding that the deceased at the time of alleged accident was traveling in the capacity of owner of goods. Mr. Thakur contended that since it stands duly proved on record that at the time of accident, no vegetables were being transported, presence if any of the deceased in the vehicle in question can be termed as gratuitous passenger and in that eventuality, appellant-Insurance Company could not have been burdened with the liability to pay compensation. Lastly, Mr. Thakur contended that since it stood proved on record that the petitioner was aged 40 years and was self employed, learned Tribunal below ought not have awarded addition of 50% to the assessed income of the deceased, on account of loss of future prospects, rather, in terms of law laid down in **National Insurance Co. Ltd.** v. **Pranay Sethi**, (2017) 16 SCC 680, addition of 40% to the established income of the deceased should have been made.

96. Having carefully perused the evidence led on record by the claimants, this court finds force in the contention of learned Counsel appearing for the appellant-Insurance Company that the claimants were not able to prove that at the time of alleged accident, deceased was earning Rs.30,000/- per month from the business of sale-purchase of vegetables. Learned Tribunal below, though has recorded the factum with regard to non-production of record/documents, if any, qua income of the deceased but despite that proceeded to assess notional income of the deceased at the rate of Rs.4500/- per month. Since it stood proved that the deceased was doing business of vegetables and he had hired the vehicle in question to transport the vegetables, no fault, if any, can be found with the findings returned by learned Court below that at the time of alleged accident, deceased was traveling in the vehicle in question as owner of goods but since claimants failed to lead specific evidence, if any, with regard to income of the deceased, learned Tribunal below ought to have resorted to assess the income of deceased taking into consideration minimum wages prevalent in the State of Himachal Pradesh at the relevant time.

97. It has nowhere come in the evidence that for carrying business of vegetables, deceased was having any shop, rather, evidence available on record suggests that he being an agriculturist, used to sell vegetables in the market, meaning thereby learned Tribunal below, while assessing monthly income of the deceased, ought to have taken into consideration, minimum wages payable to the daily wage workers in agricultural sector at the relevant time. It is not in dispute *inter se* parties that with effect from 1.10.2011, minimum wages applicable in the State of Himachal Pradesh qua agricultural sector were Rs.120/- per day. Having applied aforesaid wages in the case of deceased, his monthly income comes to Rs.3600/-.

98. Similarly, this court finds that learned Tribunal below, while applying ratio of judgment laid down by Hon'ble Apex Court in **Rajesh and others** v. **Rajbir Singh and others**, 2013 SAR (Civil) 594 proceeded to make an addition of 50% to the actual income while assessing monthly income, whereas, as per latest judgment passed by Hon'ble Apex Court in **Pranay Sethi** (supra), only an addition of 40% could have been made. In **Pranay Sethi** (supra), it has been categorically held that, if a person is self-employed and his age is less than 40 year, an addition of 40% would be made to his established income, while assessing loss of dependency. However, this Court deems it fit to make deduction towards self expenses at the rate of 1/4th of established income.

99. In the case at hand, there is no dispute *inter se* parties so far application of multiplier of 18 is concerned, because at the time of accident, admittedly deceased was 40 years of age and as such, in terms of Sarla Verma case, learned Tribunal below has rightly applied multiplier of 18, as such, same deserves to be upheld. Thus, the total loss of dependency would be:

Established income of the deceased	= Rs.3600
Deduction towards self expenses:	= 3600x1/4= 900
Income after deduction	=2700
Amount awarded on account of loss of future prospects:	2700 x 40/100 = 1080
Total income	=3780
Annual income	=3780 x 12= 45,360
Total loss of dependency after applying multiplier of 18	=45,360x18=**816480**

100. In **Pranay Sethi** (supra), Hon'ble Apex Court has held as under:

> "59. In view of the aforesaid analysis, we proceed to record our conclusions:-
>
> (i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.
>
> (ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.
>
> (iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the

deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(ix) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

10. This Court is also in agreement with Mr. Thakur, learned Counsel appearing for the appellant-Insurance Company that learned Tribunal below has erred in awarding a sum of Rs.1.00 Lakh as consortium to claimant No.1, which should have been Rs.40,000/-. Similarly, on account of funeral expenses, only a sum of Rs. 15,000/- ought to have been awarded. However, since no sum under the loss of estate has been granted, a sum of Rs.15,000/- is also liable to be awarded in favour of claimants.

11. Learned counsel for the claimants, while inviting attention to judgment rendered by Hon'ble Apex Court in **Magma General Insurance Co. Ltd.** v. **Nanu Ram and Ors.**, Civil Appeal No. 9581 of 2018 decided on 18.9.2018, argued that claimants No.3 and 4 being mother and father of deceased are also entitled to amounts on account of filial consortia, which as per aforesaid judgment ought to have been Rs.40,000/- each. Hon'ble Apex Court in **Magma General Insurance Co. Ltd.** (supra) has held as under:

"8.7 A Constitution Bench of this Court in Pranay Sethi (supra) dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is Loss of Consortium.

In legal parlance, "consortium" is a compendious term which encompasses 'spousal consortium', 'parental consortium', and 'filial consortium'.

The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse.

Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, co-operation, affection, and aid of the other in every conjugal relation."

4 Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training." Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and 3 Rajesh and Ors. vs. Rajbir Singh and Ors. (2013) 9 SCC 54 4 BLACK'S LAW DICTIONARY (5th ed. 1979) family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world-over have recognized that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.

The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of Filial Consortium.

Parental Consortium is awarded to children who lose their parents in motor vehicle accidents under the Act.

A few High Courts have awarded compensation on this count5. However, there was no clarity with 5 Rajasthan High Court in Jagmala Ram @ Jagmal Singh & Ors. v. Sohi Ram & Ors 2017 (4) RLW 3368 (Raj); Uttarakhand High Court in Smt. Rita Rana & Anr. v. Pradeep Kumar & 6 Ors. respect to the principles on which compensation could be awarded on loss of Filial Consortium.

The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under 'Loss of Consortium' as laid down in Pranay Sethi (supra).

In the present case, we deem it appropriate to award the father and the sister of the deceased, an amount of Rs. 40,000 each for loss of Filial Consortium."

12. At this stage, learned counsel for the appellant-Insurance Company argued that this Court has no power to award any extra amount/enhance the amounts already awarded by

learned Tribunal below, since no cross-objections/appeal has been filed by the claimants. On the issue of power of an appellate court to make additional award, reference may be made to a judgment rendered by Hon'ble Apex Court in **Ranjana Prakash and others** vs. **Divisional Manager and another** (2011) 14 SCC 639, whereby, it has been held that amount of compensation can be enhanced by an appellate court, while exercising powers under Order 41 Rule 33 CPC. It would be profitable to reproduce following para of the judgment herein:-

> "Order 41 Rule 33 CPC enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 CPC can be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seek compensation against the owner and the insurer of the vehicle and the tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, alongwith the owner, even though the claimants had not challenged the non-grant of relief against the insurer."

13. In view of the discussions made supra and the law laid down by Hon'ble Apex Court in the afore-cited judgments, this Court deems it fit to hold that claimants No. 1 to 3 are not entitled to any amount on account of loss of love and affection, but are entitled to Rs.15,000/- on account of loss of estate. Besides this, respondents Nos. 1, 4 and 5 are also held entitled to Rs.40,000/- each on account of respective consortia i.e. respondent No.1 being spouse and filial consortia to respondents No. 4 and 5, being parents of the deceased, for the loss of son. Thus, the total amount of compensation would be arrived as under:

Head	**Amount**
Loss of dependency (to claimants Nos. 1 to 3 only)	816480
Loss of estate (to claimants Nos. 1 to 3 only)	15000
Funeral charges (to claimants Nos. 1 to 3 only)	15000
Total	**846480**
Loss of consortium payable to claimant No.1 being wife of deceased	40000
Loss of consortia payable to claimants No.3 and 4 being parents @ Rs.40,000/- each	80000
Total compensation	**966480**

14. Similarly, as per prevailing rate of interest, 7.5% per annum is not adequate and same is enhanced to 9% per annum. Otherwise also, recently, Hon'ble Apex Court in **Reliance General Insurance Co. Ltd.** v. **Shalu Sharma,** (2018) 2 SCC 753, awarded 9% interest and as such, claimants in the present case are also entitled to a higher rate of interest i.e. 9% per annum. The Hon'ble Apex Court in the aforesaid judgment has held as under:

> "The Tribunal has awarded a sum of Rs 3,14,335 towards medical expenses. An addition of Rs 70,000 would be required to be made in terms of the decision in Pranay Sethi (supra) on account of the conventional heads of loss of estate (Rs 15,000), loss of consortium (Rs 40,000) and funeral expenses (Rs 15,000). Hence, the total compensation is quantified at Rs 27,66,522 on which the claimants would be entitled to interest @ 9% p.a. from the date of the filing of the claim petition. The apportionment shall be carried out in terms of the award of the Tribunal. We order accordingly."

15. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is disposed of and impugned award passed by learned Tribunal below is modified to aforesaid extent only. The apportionment shall remain as determined by learned Tribunal below in the impugned award.

Pending applications, if any, are also disposed of. Interim directions, if any, are vacated.

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

Suresh Kumar .....Petitioner

Versus

Pooja ...Respondent

CMPMO No. 331 of 2020
Reserved on: August 28, 2020
Decided on: September 9, 2020

Code of Civil Procedure, 1908-Order 39 Rules 1 & 2 plaintiff filed a civil suit- Seeking relief of permanent prohibitory injunction – an application seeking interim relief was filed, which was dismissal by the trial court- An appeal was filed which was also dismissed- Held a party seeking relief is not only recorded to establish prima facia case but also irreparably loss and injury which may be caused in case of denial of grant of relief- While deciding balance of convenience, court is remained to weigh protection of plaintiff right- Against need for protection of defendant' right or infringement of right- No perversity in the judgment- And order passed by the Ld, Courtws below-Petition dismissed.

Cases referred:
Ashok Kapoor vs. Murtu Devi 2016 (1) Shim. LC 207;
Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719;

M/S Gujarat Bottling Co.Ltd. & Ors. v. The Coca Cola Co. & Ors., AIR 1995 2372;
Mahadeo Savlaram Shelke v. The Puna Municpal Corpn., J.T. 1995(2) S.C. 504;
Sant Ram Nagina Ram v. Daya Ram Nagina Ram, AIR 1961 Punjab 528;
Satish Chander Sethi vs. Chuni Lal Shyam Sunder, 1996 (1) Civil Court Cases 164 (P&H)};
Seema Arshad Zaheer & Ors. vs. Municipal Corporation of Greater Mumbai & Ors. (2006) 5 SCC 282;

For the petitioner: Mr. Romesh Verma, Advocate, through video-conferencing.

For the respondent: Mr. Chandan Goel, Advocate, through video-conferencing.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant petition filed under Art. 227 of the Constitution of India, lays challenge to judgment dated 23.7.2020 passed by learned Additional District Judge(2) Shimla, District Shimla, HP in Civil Misc. Appeal no. 15-S/14 of 2020, affirming order dated 13.7.2020 passed by learned Senior Civil Judge, Court No. (2), Shimla, District Shimla, H.P. in C.M.A. No. 36/6 of 2020 (Civil Suit No. 65-1 of 2020), whereby an application under Order XXXIX, rules 1 and 2 CPC having been filed by the petitioner/appellant/plaintiff (hereinafter, 'plaintiff'), praying therein to restrain the respondent/defendant (hereinafter, 'defendant') from doing any kind of digging/excavation or construction work of any kind over the suit land, came to be dismissed.

2. Briefly stated the facts of the case, as emerge from the record, are that the plaintiff filed a suit for permanent prohibitory injunction, restraining the defendant from raising any kind of construction and changing nature of the suit land, as described in the plaint and also for grant of injunction directing the defendant to remove the construction, if any, found to have been raised by her and to restore the suit land to its original position. Alongwith aforesaid suit, plaintiff also filed an application under Order XXXIX, rules 1 and 2 CPC for restraining the defendant from doing any sort of digging, excavation or construction work over any portion of suit land, directly or indirectly in any manner, personally or through her agents, servants, family members and contractors etc. Learned trial Court, vide order dated 23.7.2020 held that since requisite ingredients for grant of injunction are not existing in favour of the plaintiff, application deserves dismissal. Feeling aggrieved and dissatisfied with aforesaid order refusing restraint order passed by the trial court, plaintiff preferred an appeal under Order XLIII, rule 1(r) CPC before learned Additional District Judge(2), Shimla, District Shimla, Himachal Pradesh, praying therein to set aside the aforesaid order and to restrain the defendant from raising any sort of construction during the pendency of the suit. However, the fact remains that learned appellate court vide judgment dated 23.7.2020, dismissed the appeal, as a consequence

of which, order dismissing interim application, came to be affirmed. In the aforesaid background, plaintiff has approached this Court in the instant proceedings.

3. Before adverting to the factual matrix of the case vis-à-vis prayer made in the petition at hand, this Court deems it proper to delve upon the factors and principles to be borne in mind by the court, while considering application seeking injunction order. It is well settled that before grant of injunction, court must be satisfied that the party praying for relief has a prima facie case and balance of convenience is in its favour. Besides above, while granting injunction, if any, court is also required to consider that whether the refusal to grant injunction would cause irreparable loss to such a party. Apart from aforesaid well established parameters/ingredients, conduct of the party seeking injunction is also of utmost importance, as has been held by Hon'ble Apex Court in case **M/S Gujarat Bottling Co.Ltd. & Ors.** v. **The Coca Cola Co. & Ors.,** AIR 1995 2372. In case a party seeking injunction fails to make out any of the three ingredients, it would not be entitled to injunction. Phrases, "prima facie case", "balance of convenience" and "irreparable loss", have been beautifully interpreted/defined by Hon'ble Apex Court in case **Mahadeo Savlaram Shelke** v. **The Puna Municpal Corpn.,** J.T. 1995(2) S.C. 504 relying upon its earlier judgment in **Dalpat Kumar** v. **Prahlad Singh**, (1992) 1 SCC 719 has held as under:

> "...the phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of justice. The court would be circumspect before granting the injunction and look to the conduct of the party, the probable injury to either party and whether the plaintiff could be adequately compensated if injunction is refused. The existence of prima fade right and infraction of the enjoyment of him property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury but means only that the Injury must be a material one, namely one that cannot be adequately compensated by way of damages. The balance of convenience must be in favour of granting injunction. The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is

granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. The court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

4. Similarly, issues with regard to rights and liabilities of co-sharers came to be dealt with by Division Bench of Punjab and Haryana High court in **Sant Ram Nagina Ram** v. **Daya Ram Nagina Ram,** AIR 1961 Punjab 528, wherein it has been held as under:

(1) A co-Owner has an interest in the whole property and also in every parcel of it.

(2) Possession of the joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.

(3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession, of a co-owner must not only be exclusive but also hostile to the knowledge of the other, as, when a co-owner openly asserts his own title and denies that of the other.

(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

(6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

(7) Where a co-owner is in possession of separate parcels under an arrangement consented to by the other co-owners, it is not open to any one to disturb the arrangement without the consent of others except by filing a suit for partition."

5. A Coordinate Bench of this Court in **Ashok Kapoor** vs. **Murtu Devi** 2016 (1) Shim. LC 207, had an occasion to deal with the issue of injunction, wherein it, having taken note of various judgments rendered by Constitutional courts, concluded as under:

"46. On consideration of the various judicial pronouncements and on the basis of the dominant view taken in these decisions on the rights and liabilities of the co-sharers and their rights to raise construction to the exclusion of others, the following principles can conveniently be laid down:-

i) a co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property absolutely and simply because he is a co-owner unless any act of the person in possession of the property amounts to ouster prejudicial or adverse to the interest of the co-owner out of possession.

ii) Mere making of construction or improvement of, in, the common property does not amount to ouster.

(iii) If by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property.

(iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such act which is detrimental to his interest.

(v) before an injunction is issued, the plaintiff has to establish that he would sustain, by the act he complains of some injury which materially would affect his position or his enjoyment or an accustomed user of the joint property would be inconvenienced or interfered with.

(vi) the question as to what relief should be granted is left to the discretion of the Court in the attending circumsta nces on the balance of convenience and in exercise of its discretion the Court will be guided by consideration of justice, equity and good conscience.

47. The discretion of the Court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff:-

(i) existence of a prima facie case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction;

(ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's right or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and

(iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted.

In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the Court with clean hands."

6. In the aforesaid backdrop as well as law laid down by Hon'ble Apex Court and other High Courts, this Court would proceed to decide the controversy at hand.

7. Having heard learned counsel for the parties and perused the material available on record, this Court finds no illegality or perversity in the findings recorded by both the learned Courts below, especially when it stands admitted by the plaintiff that there are constructions on the scattered portions of land in question, where plaintiff claims land to be joint. When constructions have been raised by various cosharers/plot holders, status of land cannot be said to be joint in nature, though it may be subsequently got partitioned in accordance with law.

8. There is statutory law governing relationship amongst cosharers *inter se* qua common property as such, matter is to be regulated by rules of justice, equity and good conscience. While considering question of injunction, which needs to be decided on each peculiar fact, it is always for the court to exercise /deny discretion in view of all the facts and circumstances of each case and to find out on which side balance of convenience lies.

9. Though, in the case at hand, pleadings as well as documents adduced on record by the respective parties indicate that the nature of suit land is still joint because, till date, no partition has taken place *inter se* parties in accordance with law, but the plaintiff has not been able to dispute that their predecessor-in-interest, during his life time had sold land to Gulpal, Kalpana and to one Shri Krishan, who further sold it to Smt. Ram Pati and such persons have already raised construction over specific portions of land. One of the cosharers named herein above, namely Ram Pati is raising construction at present and since it stands established on record that Surinder Kumar, father of the defendant had purchased 0-4 Biswa of land from Jeet Ram, and he was put in possession over specific portion of land, plaintiff, who is otherwise uncle of the defendant, cannot be allowed to raise the plea at this stage that since land in question is joint *inter se* parties, defendant should not be allowed to raise construction till the time suit land is partitioned by metes and bounds. Aforesaid 0-4 Biswa of land purchased by Surinder Kumar from his father, subsequently came into share of present defendant in family settlement. Defendant, in her reply to the application, has pleaded that the status of the suit land never remained 'joint' though the same is being reflected as 'joint' in the revenue papers. Father of the defendant, in family settlement, gave land out of his share to the defendant and also handed over vacant possession thereof to her, as such, she is in exclusive possession of the said land since then. Defendant has further claimed that she has spent a huge amount in developing the suit land. Besides above, defendant claimed that the plaintiff, Suresh Kumar alongwith Narinder and Surinder is co-owner-in-possession of specific land, though the same has not been partitioned but portions of land were sold to other persons, who had carried construction a long time back and, at that time, no objection was ever raised by any of the co-owners, as such, suit deserves to be dismissed on this count. Defendant has further averred that the plaintiff and Narinder have 14 shares and her father, Surinder Kumar had 26 shares, out of which he gave 152/1622 share measuring 00-01-52 Hectares of land to her and she is in possession of the same. It is further averred in the reply that the plaintiff and Narinder Kumar sold portions of their shares during the life time of Jeet Ram and Surinder Kumar sold 12 shares out of his share to Gulpal and that is why, Surinder, father of the defendant was having 26 shares, whereas, plaintiff and Narinder Kumar were having only 14 shares each as reflected in Nakal Khatauni. Defendant specifically denied that area of Khasra No. 58 is by the road side and plaintiff will be deprived of enjoying his share abutting road side in case she is permitted to raise construction. Record reveals that the defendant, with a view to strengthen her claim that her father purchased suit land from Jeet Ram also supplied photocopies of Sale deed No. 358/1999 and Jamabandi for the years 1994-95, suggestive of the fact that the land comprising of Khata No. 2, Khatauni No. 4 min, Khasra No. 26, area measuring 2-3 Bigha is exclusively

owned and possessed by late Jeet Ram son of Shri Debu Ram. Most importantly, in the remarks column there is reference of Mutation No. 299, which stands attested and sanctioned in favour of Surinder Kumar, father of the defendant.

10. Plaintiff before filing the suit against the defendant, did not file any suit against other subsequent vendees i.e. Gulpal, Kalpana and Smt. Ram Pati, who is alleged to be raising construction during pendency of the instant proceedings, rather, he specifically chose the defendant to file the suit. As has been taken note herein above, father of the defendant was put in possession of specific portion of suit land by late Jeet Ram. Plaintiff is required to respect this arrangement and as such, his plea cannot be accepted that father of the defendant was not in possession over any specific portion of land.

11. Leaving everything aside, there is no dispute *inter se* parties that prior to filing of suit at hand, plaintiff's brother namely Narinder Kumar had filed a similar suit against the defendant alongwith an application under Order XXXIX, rules 1 and 2 CPC for grant of interim injunction. Application as referred to above was dismissed vide order dated 1.7.2020 as such, same application though has been filed by the plaintiff cannot be said to be maintainable, especially when in earlier proceedings, dispute is /was raised qua same land, which is subject matter of present suit. Conduct of the plaintiff can further be taken note of by noticing that neither he nor his brother, Narinder Kumar chose to file suit against other persons namely Kalpana and Smt. Ram Pati, rather, they both chose present defendant to file suit against her.

12. It is well settled by now that a person, who seeks equity must do equity as well. Besides above, it is pleaded case of the defendant that she filed caveat against plaintiff and his brother, namely Narinder Kumar as Narinder Kumar failed to get said order in the suit having been filed by him, as such, plaintiff, in the case at hand, wrongly averred in the plaint that cause of action accrued to him on 1.7.2020, when he filed suit against the defendant. There cannot be any denial of the fact that a co-sharer who is in possession of the property is also entitled to the employment of the same. The possession of one of cosharers is possession of all in the eye of law, unless the person who has been in exclusive possession asserts his title, in himself to the exclusion of the other co-sharers which may amount to ouster.

13. During proceedings of the case, learned Counsel appearing for the plaintiff, placed reliance upon various judgments rendered by Hon'ble Apex Court as well as this Court i.e. Parduman Singh and another vs. Naruin Singh and another (1991 CCC 803 (HP), Nagesh Kumar vs. Kewal Krishan (AIR 2000 Himachal Pradesh 116), Shiv Chand vs. Manghru and others (2007(1) Shim. LC 389), Prabhu Nath and another vs. Sushma (2014 (2) Shim. L.C. 1003). Having carefully perused the aforesaid judgments pressed into service by learned

Counsel appearing for the plaintiff, while asserting claim of the plaintiff, this Court finds that ratio laid down in aforesaid judgments is with regard to rights of cosharer in the joint land, particularly where nature of the suit land is joint and land has not been changed and there is no kind of construction activity by any of cosharers. Very gist of the aforesaid judgments is that possession of one cosharer is possession of all the cosharers in joint land till the time same is partitioned by metes and bounds but, in the case at hand, as clearly emerges from the pleadings as well as documents adduced on record that none of the parties have come with the plea that they are in possession of the joint land, rather, plaintiff himself has not come up with specific plea that he is in possession of any portion of joint land and revenue record itself suggests that the plaintiff alongwith his two brothers Suresh Kumar and Narinder Kumar was having equal shares in the suit land at the time when they succeeded to the share of their mother, who in turn succeeded to share of Jeet Ram, who happened to be maternal grandfather of the plaintiff-Suresh and his other brothers.

14. Contention of the plaintiff that best portion of the suit land is being utilized by the defendant for the construction of her house and such construction, if allowed, will be detrimental to his valuable right, though appears to be attractive but has no merit, especially when pleadings and documents available on record indicate that some of the cosharers in the suit land, have not only constructed their houses but also mortgaged the same in favour of various financial institutions, as has been reflected in the mutations Nos. 457, 585 and 578.

15. In view of the aforesaid subsequent developments nature of the suit land cannot be said to be 'joint', rather, same stands changed. Pleadings set up in the application as well as main suit also do not reveal that the defendant is raising construction on suit land exceeding her share and as per entry in Nakal Khatauni and family settlement deed, defendant could be said to have gained possession in the suit land to the extent of one share transferred in her name by her father, as such, learned Court below, while refusing restraint order against the defendant, has rightly concluded that it would be unjustified to restrain her from utilizing the land falling to her share for construction of house, especially when other cosharers have constructed their houses in other parcels of joint land to the extent of their shares. There is no material worth credence available no record suggestive of the fact that the plaintiff had raised dispute/objection, if any, when other co-owners had raised construction of their houses in the suit land.

16. At this stage, Mr. Romesh Verma, Advocate, learned Counsel appearing for the plaintiff stated that since the plaintiff was not in picture when such construction was raised, factum with regard to construction, if any, by other cosharers cannot be made ground to refuse injunction in the suit at hand, but aforesaid plea of Mr. Verma deserves outright rejection for

the reason that the plaintiff being son of Jeet Ram i.e. original owner of the suit land, cannot be allowed to unsettle the things which were done by his father during his life time, rather, plaintiff is required to respect the arrangement as was done by his father prior to his death, as such, he is estopped from claiming that father of the defendant was not in possession over specific portion of suit land. Having perused the material available on record especially family settlement deed, it can be safely inferred that the defendant stepped into the shoes of her father, Surinder Kumar, consequent upon execution of settlement deed in her favour.

17. Though, in the case at hand possession of the defendant over specific portion of land is disputed by the plaintiff but having carefully perused the family settlement deed, it can be safely inferred that the defendant stepped into shoes of her father Surinder Kumar, consequent to execution of family settlement deed in her favour and she having been given physical possession of her share in the suit land, cannot be restrained from raising construction over the same till the partition of property in metes and bounds, especially when plaintiff has not been able to dispute that other cosharers who were put in possession of specific portions of land, have not only raised construction but subsequently sold their shares to other persons. It is well settled that any such person who comes in the foot step of a co-sharer has a right to enjoy the property, which is in his possession, till it is partitioned, which will also include, to effect all necessary improvements, especially when the other party does not stand to lose in view of the specific undertaking given by the party. {See. **Satish Chander Sethi** vs. **Chuni Lal Shyam Sunder,** 1996 (1) Civil Court Cases 164 (P&H)}.

18. Once, the plaintiff has not been able to dispute that father of the defendant i.e. Surinder Kumar had purchased 0-4 Biswa of land from his father, Jeet Ram, during his life time, which ultimately came into share of the defendant herself in the family settlement, he is estopped from claiming that the defendant herself is not in possession of specific portion of land, factum qua which otherwise stands recorded in the revenue record, as has been taken note herein above. Plaintiff has simply stated that the defendant intends to raise construction on best portion of land on Shimla-Shoghi By-pass, but it is not specifically spelt out in the pleadings in what manner, he will suffer damages in case, defendant is not restrained from raising construction, as such, learned Courts below have rightly refused to grant restraint order as prayed for by him in the application filed under Order XXXIX, rules 1 and 2 CPC. It is clearly manifest from the record that defendant claimed possession of suit land qua share of her father on the basis of settlement deed, as such, raising of construction on said parcel of land by no stretch of imagination can be said to be ouster of plaintiff from suit land, especially when plaintiff has not come forward with the plea that said parcel of land was not allotted to father of

the defendant prior to execution of settlement and that his share will be decreased from the suit land in case, defendant is permitted to raise construction on the suit land.

19. Hon'ble Apex Court in **Seema Arshad Zaheer & Ors**. vs. **Municipal Corporation of Greater Mumbai & Ors.** (2006) 5 SCC 282, has held as under:

> "29. The discretion of the court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff : (i) existence of a prima facie case as pleaded, necessitating protection of plaintiff's rights by issue of a temporary injunction; (ii) when the need for protection of plaintiff's rights is compared with or weighed against the need for protection of defendant's rights or likely infringement of defendant's rights, the balance of convenience tilting in favour of plaintiff; and (iii) clear possibility of irreparable injury being caused to plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the court with clean hands."

20. It can be safely inferred from aforesaid law laid down by this court that grant of temporary injunction is not to be claimed by a party as a matter of right nor can be denied by a court arbitrarily rather, discretion in this regard is to be exercised by a court on the basis of principles, as have been enunciated in the aforesaid judgment.

21. A party seeking relief is not only required to establish prima facie case but also irreparable loss and injury which may be caused to it in case of denial of grant of relief. While deciding balance of convenience, court is required to weigh protection of plaintiff's right against need for protection of defendant's right or infringement of right.

22. Consequently, in view of above, this court finds no illegality or infirmity with the judgment passed by appellate court below, which is accordingly upheld. The petition at hand stands dismissed alongwith all pending applications. However, it is clarified that the defendant would not raise any construction beyond her specific share in the suit land, as has been claimed in the instant petition and construction, if any, raised during the pendency of the main suit, shall be subject to outcome of the said suit.

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

1. FAO No. 356 of 2014

Oriental Insurance Company Ltd. .....Appellant

Versus

Basant Ram and another

...Respondents

2. FAO No. 191 of 2015

Smt. Santosh Devi and others .....Appellants

Versus

Rakesh Kumar and another ...Respondents

FAO Nos. 356 of 2014 & 191 of 2015
Decided on: August 11, 2020

Motor Vehicle Act, 1988- Section 166- Claimant had sustained 30% permanent disability- Ld. Tribunal below awarded compensation to the time of Rs. 9,65000 alongwith interest at the rate of 7% p.a- Monthly income of claimant established to be Rs. 7000/-- And loss of future income is Rs. 831600 applying multiplieral 9- Compensation as Rs. 300000 under the head pain suffering and trauma, Rs. 3000 /- awarded charge 500000 medical treatment, Rs. 15000 Taxi charges and Rs. 50000 leave encashment- Claimant is entitled to Rs. 14,76600 as compensation- Rate of interest enhanced 9 % from 7% p.a- Award modified.

Cases referred:

Jagdish v. Mohan & Others, (2018) 4 SCC 571;
National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017 SC 5157;
Reliance General Insurance Co. Ltd. v. Shalu Sharma, (2018) 2 SCC 753;
Sarla Verma and others vs. Delhi Transport Corporation and another, 2009 AIR(SC) 3104;

FAO No. 356 of 2014

For the appellant — Mr. Lalit K. Sharma, Advocate, through video-conferencing.

For the respondents: — Mr. J.L. Bhardwaj, Advocate, for respondent No.1, through video-conferencing.
None for respondent No.2

FAO No. 191 of 2015

For the appellants — Mr. J.L. Bhardwaj, Advocate, Advocate, through video-conferencing.

For the respondents: — Mr. Sumit Sood, Advocate, for respondent No.1, through video-conferencing.
Mr. Lalit K. Sharma, Advocate, for respondent No.2, through video-conferencing.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Since both these appeals arise out of Award dated 2.6.2014 passed by learned Motor Accident Claims Tribunal-I, Solan, District Solan, Himachal Pradesh in M.AC Petition No. 11-S/2 of 2009, these were taken up for hearing together and are being disposed of vide this common judgment.

2. Precisely the facts of the case, as emerge from the record are that on 19.2.2006, claimant, Basant Ram suffered grievous injuries on his person after being hit by a Maruti Car bearing registration No. HP-39-A-2666, being driven in rash and negligent manner by its Driver, Rakesh Kumar (respondent No. 1 before learned Tribunal below). Rakesh Kumar assured the claimant to get his treatment done but fact remains that he never met the claimant nor paid any amount to him after the accident. Claimant remained hospitalized firstly at CHC, Dharampur, then at Zonal Hospital Solan, at IGMC Shimla and lastly at PGI Chandigarh. Claimant claimed that on account of injuries suffered by him in the accident, he had to spend a sum of Rs.2,50,000/- on his treatment. Claimant also claimed that he suffered 30% permanent disability on account of fracture in his leg. Claimant, while, claiming compensation to the tune of Rs.15,00,000/-, claimed before learned Tribunal below that besides his earning from MES, he was also earning Rs.8,000-10,000/- from agricultural pursuits, which he is now unable to do on account of permanent disability. Driver of the offending vehicle though admitted the factum with regard to accident but denied that the vehicle in question was being driven rashly and negligently by him at the time of accident. While denying the claim of the claimant that apart from getting salary from MES, he was also earning a sum of Rs.8,000-10,000/- from agricultural pursuits, respondent-driver also denied the claim that claimant had spent Rs.2,50,000/- on his medical treatment.

3. Oriental Insurance Company Limited besides opposing the claim of the claimant on technical grounds also claimed that since driver of the offending vehicle was not having a valid and effective driving licence and vehicle in question was being plied in contravention of the terms and conditions contained in the insurance policy, it is not liable to indemnify the insured. Besides above, insurance company also claimed that the claim petition has been filed in collusion with the driver of the offending vehicle by the claimants.

4. On the basis of pleadings of the parties and evidence adduced on record by respective parties, following issues were framed by learned Tribunal below on 5.9.2013:

> "1. Whether the respondent No.1, was driving the offending vehicle Maruti car No. HP-39-A-2666 in a rash and negligent manner on the road and had struck it against the petitioner near Do-Sarka Dharampur and caused grievous injuries to him with permanent disability? OPP
> 2. If issue No.1, is proved in affirmative, to what amount of compensation the petitioner is entitled to and from whom? OPP
> 3. Whether the petition is not maintainable in the present form and the petitioner has no cause of action to file the petition, as alleged? OPR-2
> 4. Whether the respondent No.1, was not having valid and effective driving licence to drive the offending vehicle as alleged? If so, its effect? OPR-2

5. Whether the offending vehicle was being plied in breach of terms and conditions of the insurance policy by the respondent No.1, as alleged ? If so, its effect?
6. Relief."

5. Subsequently, vide impugned award dated 2.6.2014, learned Tribunal below allowed the claim petition and held the claimant Basant Ram, entitled to compensation to the tune of Rs.9,65,000/- alongwith interest at the rate of 7% per annum from the date of filing of the petition till realization. In the aforesaid background, claimant as well as insurance company have approached this Court by way of two separate appeals i.e. FAO No. 356 of 2014 is by the insurance company for setting aside the impugned Award and FAO No. 191 of 2015 is by the claimant for enhancement of the award amount.

6. Before proceeding further, it may be observed that the claimant Basant Ram, appellant in FAO No. 191 of 2015 and respondent No.1 in FAO No. 356 of 2014 expired during the pendency of the appeals. In FAO No. 191 of 2015, legal heirs of the deceased claimant, Basant Ram have been brought on record whereas, in FAO No. 356 of 2014, no steps ever came to be taken at the behest of insurance company for bringing on record legal heirs of the deceased claimant. Since legal heirs of claimant, Basant Ram are on record in FAO No. 191 of 2015, this Court, on the oral prayer of learned Counsel appearing for the insurance company, orders impleadment of legal heirs of Basant Ram, and their substitution in place of Basant Ram. Registry to carry out necessary correction in the memo of parties in FAO No. 356 of 2014 on the basis of memo of parties in FAO No. 191 of 2015.

7. Mr. Lalit K. Sharma, learned Counsel appearing for the insurance company contends that the impugned award passed by learned Tribunal below is on higher side and deserves to be reduced accordingly. While referring to the record, Mr. Sharma, vehemently submits that learned Tribunal below has fallen in grave error by taking income of the claimant at Rs.10,000/- per month on account of agricultural pursuits. He submits that since the claimant has failed to prove his income in the manner assessed by learned Tribunal below, save and except solitary deposition of the claimant in Ext. PW-1/A, learned Tribunal below ought not have returned the finding that resultant loss of income of the claimant on account of disability of 30% was Rs.7,000/- per month. He further submits that though claimant in the claim petition claimed that he was mason in MES, Dagshai and was employed but at no point of time, evidence, if any, qua aforesaid aspect of the matter came to be led on record, as such, in the absence of such evidence, learned Tribunal below wrongly concluded that income of the claimant was Rs.10,000/- per month. While referring to the evidence led on record by the claimant, Mr. Sharma, states that it stands duly established on record that the claimant was only able to

prove that he spent Rs.1,386/- on account of treatment as such, learned Tribunal below erred in awarding a sum of Rs.1,25,000/- on account of medical treatment. Mr. Sharma also contends that since no specific evidence ever came to be led on record with regard to hospitalization of the claimant for 15-20 days, no amount, if any, could have been awarded by learned Tribunal below on account of attendant charges and transportation charges. Lastly, Mr. Sharma contends that once learned Tribunal below had awarded a sum of Rs.1,25,000/- on account of 30% disability allegedly suffered by the claimant in the accident, as per Ext. PW-7/A, learned Tribunal below could not have awarded a sum of Rs.4,20,000/- on account of such disability without explaining exact loss of income.

8. On the other hand, while seeking enhancement of award amount, Mr. J.L. Bhardwaj, learned Counsel appearing for the claimants contends that once it stood duly established on record that the claimant suffered 30% permanent disability on account of fracture suffered by him in the alleged accident, learned Tribunal below rightly awarded lump sum compensation of Rs.1,25,000/- and Rs.30,000/- on account of treatment and attendant charges, respectively. While referring to the judgment rendered by Hon'ble Apex Court in **National Insurance Company Limited** vs. **Pranay Sethi and others**, AIR 2017 SC 5157, Mr. Bhardwaj contends that learned Tribunal below ought to have made an addition of 10% while assessing loss of future prospects, as such, award in this regard requires to be enhanced. Mr. Bhardwaj contends that since age of the claimant at the time of accident was 59 years, learned Tribunal below ought to have applied multiplier of 9 in terms of **Sarla Verma and others** vs. **Delhi Transport Corporation and another**, 2009 AIR(SC) 3104 but, in the case at hand, learned Tribunal below erred, while applying multiplier of 5. Mr. Bhardwaj further contends that the sum awarded on account of loss of amenities i.e. Rs.75,000/- is on lower side, because on account of permanent disability, claimant would not be able to lead normal life as such, impugned award under this head needs to be increased. Lastly, Mr. Bhardwaj contends that the interest awarded is also on lower side, which may be enhanced.

9. I have heard learned counsel for the parties and perused the material available on record.

10. Having heard learned counsel for the parties and perused material available on record, this Court finds that primarily challenge to impugned award on behalf of the insurance company is on the quantum of compensation as such, this Court is not required to look into other aspects of matter. Perusal of evidence adduced on record by respective parties clearly reveals that no evidence ever came to be led on record by the respondents including insurance company, to the contrary, claimant with a view to prove that he suffered multiple injuries and 30% disability (permanent) examined as many as six witnesses. Though Mr. Lalit K. Sharma,

learned Counsel appearing for the insurance company, made an attempt to demonstrate from the record that claimant did not sustain 30% disability but there is ample evidence on record suggestive of the fact that in the alleged accident, claimant suffered fracture and on account of which, he has become 30% permanently disabled, as is evident from disability certificate, Ext. PW-7/A. Disability certificate Ext. PW-7/A has been duly proved on record by the claimant. Close scrutiny of the evidence available on record clearly reveals that on account of accident, petitioner suffered 30% permanent disability and remained admitted in various hospitals.

11. True it is that the claimant, while claiming that he remained admitted in CHC Dharampur, Zonal Hospital Solan, IGMC Shimla and PGI, failed to place on record evidence with regard to his hospitalization, but the factum with regard to his having sustained grievous injuries in the accident can be easily gathered from the disability certificate, Ext. PW-7/A, which stands duly established on record. Having taken note of the injuries allegedly suffered by the claimant, it can be easily inferred that claimant must have remained admitted in the hospitals that too for at least 15-20 days, as such, learned Tribunal below rightly considered the duration of the claimant being an indoor patient for 15 days and awarded compensation at the rate of Rs.2000/- per day including attendant charges, impugned award on account of aforesaid head i.e. Rs.30,000/- cannot be said to be on higher side by any stretch of imagination.

12. However, having taken note of the fact that the claimant was only able to prove that he incurred expenses to the tune of Rs.1386/-, impugned award passed by learned Tribunal below to the tune of Rs.1,25,000/- on this count needs to be reduced. From the perusal of record, this Court finds that though the claimant placed on record photocopies of bills indicative of the fact that Lakhs of Rupees were spent by him on the treatment but, same were not prove in accordance with law, but, as has been taken note herein above, that the factum with regard to claimant having suffered 30% disability on account of fracture is not in dispute, as such, it can not be said that claimant only spent Rs.1386/- on his medical treatment, therefore, having regard to the nature of injuries suffered by the claimant, this Court can presume that he must have spent at least Rs.50,000/- on his treatment, as such, he is held entitled to Rs.50,000/- on account of medical expenses.

13. Similarly, this Court finds that the claimant with a view to prove that he spent amount on transportation, though failed to place on record bills, if any, but he successfully proved on record that on account of his treatment, he was being repeatedly taken to hospital in taxi being driven by Madan (PW-5), driver of the taxi, has categorically stated that he repeatedly took claimant to the hospitals for treatment. If the cross-examination conducted upon this witness by insurance company is perused, it cannot be said that the insurance company was able to shatter the testimony of this witness, as such, no fault, if any, can be found with the award so

far amount under this head i.e. Rs. *15*,000/- has been awarded. On account of injuries suffered by the claimant in the accident, he must have undergone pain, suffering and trauma as such, he came to be rightly compensated for the same by learned Tribunal below. However, amount as awarded by learned Tribunal below on these counts appears to be on lower side, as such same is enhanced to Rs.2,00,000/- from Rs.1,25,000/-.

14. So far as award of compensation of Rs.1,25,000/- on account of claimant having suffered 30% permanent disability, as reflected in Ext. PW-7/A is concerned, this Court finds force in the submission made by Mr. Lalit K. Sharma, Advocate, that once learned Tribunal below had held claimant entitled to compensation on account of loss of amenities as well as expectation of life, there was no occasion, if any, for learned Tribunal below to award Rs.1,25,000/- on account of claimant having suffered 30% permanent disability, which otherwise could not have been awarded.

15. Having taken note of extent of disability suffered by the claimant, learned Tribunal below could have awarded amount, if any, under the head of loss of earning capacity of the claimant with permanent disability to the extent of 30%. Hon'ble Apex Court in Hydro Allowance in **Jagdish** v. **Mohan & Others**, (2018) 4 SCC 571 has carved out certain principles, which are reproduced herein below:

> "3. In assessing the compensation payable the settled principles need to be borne in mind. A victim who suffers a permanent or temporary disability occasioned by an accident is entitled to the award of compensation. The award of compensation must cover among others, the following aspects:
>
> (I) Pain, suffering and trauma resulting from the accident.
>
> (II) Loss of income including future income;
>
> (III) The inability of the victim to lead a normal life together with its amenities;
>
> (IV) Medical expenses including those that the victim may be required to undertake in future; and
>
> (V) Loss of expectation of life."

16. Perusal of aforesaid judgment reveals that the victim who suffers permanent or temporary disability on account of accident is entitled to be awarded compensation on account of loss of future income. In the case at hand, learned Tribunal below, though has awarded some amount on account of pain, suffering and trauma resulting from the accident but no amount, if any, ever came to be awarded on account of loss of earning capacity of the claimant, who admittedly suffered permanent disability to the extent of 30% in the alleged accident.

17. Learned Tribunal below, while denying compensation, if any, on account of loss of income has observed that since the claimant was employed as a Mason in MES, Dagshai, and he was retired in June, 2008, no compensation is required to be given under this head but,

aforesaid reasoning, as has been given by learned Tribunal below, does not appear to be correct, especially , when no evidence, ever came to be led on record by respective parties that the claimant was in receipt of some kind of salary from MES on account of his serving there. Since no positive evidence ever came to be led on record with regard to salary, if any, paid to the claimant by MES, it is not understood that on what basis, learned Tribunal below, while denying compensation to the claimant, under the head, loss of income, returned finding that since claimant remained on leave for one year, he must have received salary qua aforesaid period. Interestingly, while recording aforesaid findings, learned Tribunal below proceeded to award a sum of Rs.50,000/- on account of leave encashment. Claimant, by way of leading cogent and convincing evidence successfully proved on record that he besides earning Rs.8,000-10,000/- from agricultural pursuits, was also serving as a Mason with MES, as such, it can be safely inferred that had the claimant not suffered permanent disability on account of injuries suffered by him in the accident, he would have also earned some amount being mason apart from his income from agricultural pursuits. The Question, whether the claimant being Government employee could have continued to pursue his vocation as a mason after his retirement, is of no relevance, especially when insurance company failed to prove on record that at the time of accident, claimant was permanent employee of MES and he was paid regular salary.

18. In light of aforesaid discussion, this Court while setting aside compensation to the tune of Rs.1,25,000/- awarded by learned Tribunal below on account of claimant having suffered 30% permanent disability, permanent in nature, deems it fit to award a sum of Rs.3,00,000/-, in lump sum on account of loss of amenities and loss of expectation of life.

19. Since insurance company failed to refute the claim of the claimant that besides his earning from MES, he was earning Rs.8,000-10,000/- per month from agricultural pursuits, learned Tribunal below rightly took established income of the claimant as Rs.7,000/-, while assessing future income. However, multiplier of 5 as applied in the case is not justified because, at the time of accident, claimant was 59 years of age and as such, multiplier of '9' ought to have been applied by learned Tribunal below in terms of **Sarla Verma** (supra).

20. Thus, the amounts to which claimant is entitled are assessed/re-assessed as under:

Attendant charges	**30000**
Medical treatment/expenses	**50000**
Taxi charges	**15000**
Pain, suffering and trauma	**200000**
Loss of amenities of life and loss of expectation of life	**300000**
Leave encashment	**50000**
Loss of future income after taking established income at Rs.7,000/- per month	**831600**

Established income =7000
Addition on account of future prospects @ 10% =700
Total income = 7700
Total loss of future income after applying multiplier of '9'
7700x 12x 9=

Total **1476600**

21. Besides this, the interest awarded by learned Tribunal below is also on lower side, which also requires to be enhanced to 9%. Recently, Hon'ble Apex Court in **Reliance General Insurance Co. Ltd.** v. **Shalu Sharma,** (2018) 2 SCC 753, awarded 9% interest and as such, this court deems it necessary to enhance the rate of interest awarded by learned Tribunal below. Ordered accordingly. The Hon'ble Apex Court in the aforesaid judgment has held as under:

> "The Tribunal has awarded a sum of Rs 3,14,335 towards medical expenses. An addition of Rs 70,000 would be required to be made in terms of the decision in Pranay Sethi (supra) on account of the conventional heads of loss of estate (Rs 15,000), loss of consortium (Rs 40,000) and funeral expenses (Rs 15,000). Hence, the total compensation is quantified at Rs 27,66,522 on which the claimants would be entitled to interest @ 9% p.a. from the date of the filing of the claim petition. The apportionment shall be carried out in terms of the award of the Tribunal. We order accordingly."

22. In view of above, both the appeals stand disposed of. Impugned award stands modified in the aforesaid terms. Pending applications, if any, are disposed of. Interim orders, if any, stand vacated.

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

Pepsu Road Transport Corporation, Patiala .....Appellant

Versus

Mehar Chand (deceased) through LR's Sugriv Singh and others

...Respondents

FAO No. 410 of 2018
Decided on: August 11, 2020

Motor Vehicle Act, 1988- Section 166- Legal representative of a deceased can always file claim petition under the Act seeking therein compensation on account of death of deceased, who may be father, mother, brother, sister etc of such claimant. (Para 11).
Maintainability-Objection can not be permitted to be taken up at appellate stage- Appeal dismissed. (Para 12)

Cases referred:

Sarla Verma and others vs. Delhi Transport Corporation and another, 2009 AIR(SC) 3104;
Reliance General Insurance Co. Ltd. v. Shalu Sharma, (2018) 2 SCC 753;

For the appellant	Mr. Ajay Sharma, Senior Advocate, through video-conferencing.
For the respondents:	Mr. Jeevan Kumar, Advocate, for respondents Nos.1 and 2, through video-conferencing.
	None for respondent No.3.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with award dated 2.5.2018, whereby learned Tribunal below while allowing claim petition i.e. RBT MAC Petition No. 144-G/II/13/12 filed by respondents Nos. 1 and 2/claimants (hereinafter, 'claimants') saddled the appellant with the liability to pay compensation to the tune of Rs.2,82,128/- alongwith interest at rate of 9% per annum from the date of filing of the petition till realization to the claimants, appellant has approached this Court in the instant proceedings, praying therein to set aside the award passed by learned Tribunal below.

23. Precisely, the facts of the case are that on 14.9.2011, mother of the claimants, Smt. Vidya Devi alongwith her sister, Smt. Neema Pathania was traveling from Kangra to Palampur in bus bearing registration No. PB1122-3673 being driven by respondent No.3/driver. At around 2.45 pm, driver of the aforesaid vehicle lost control, as a result of which, bus fell into a gorge and passengers of the vehicle, including Smt. Vidya Devi sustained injuries. Smt. Vidya Devi was hospitalized but, unfortunately, she succumbed to her injures on 27.9.2011, whereafter, claimants alongwith their father, Mehar Chand, who also died during the pendency of the claim petition, filed the said claim petition claiming compensation to the tune of Rs. 40.00 Lakh on account of death of their mother alongwith interest at the rate of 12% per annum.

24. Respondent No.3, driver of the offending vehicle, contested the claim petition by taking preliminary objections of maintainability and cause of action. On merits, said respondent pleaded that he was not negligent while driving the offending vehicle and as such, not liable to pay any compensation. Besides above, respondent No.3 also claimed that the amount of compensation claimed is on higher side.

25. Appellant adopted the reply filed by respondent No.3.

26. On the basis of pleadings of the parties and evidence adduced on record by respective parties, following issues were framed by learned Tribunal below on 26.12.2016:

> "1. Whether deceased Vidya Devi died in a motor vehicle accident which took place on 14.9.2011 around 2.45 P.M. at place near Thanpuri on Pathankot-Palampur Road, within the jurisdiction of police station, Nagrota Bagwan by the

rash and negligent driving of the respondent No.2 Shri Balkar Singh o his bus bearing No. PB1122-3673 on a public way? OPP

2. If issue No.1 is proved in affirmative, whether petitioners are entitled for grant of compensation, if so, to what amount and from whom? OPP
3. Whether the petition is not maintainable, as alleged? OPR-2
4. Whether the petitioners have no cause of action and locus standi? OPR
5. Relief".

27. Subsequently, vide impugned award dated 2.5.2018, learned Tribunal below allowed the claim petition and held them entitled to compensation to the tune of Rs.2,82,128/- alongwith interest at the rate of 9% per annum from the date of filing of the petition till realization.

28. Primarily, the challenge to the impugned award has been laid on two counts by the appellant i.e. firstly, that the claimants did not choose to file the claim petition claiming themselves to be dependent upon their mother or taking other grounds, as such, no compensation could have been awarded in their favour by learned Tribunal below and further that the claim petition was filed by late Mehar Chand i.e. father of the claimants, claiming himself to be aggrieved being husband of late Vidya Devi, who died during the pendency of the claim petition on 13.1.2017, as such, claim, if any, of the deceased Mehar Chand being personal will not subsist and, secondly, that while calculating the loss of dependency, learned Tribunal below has wrongly applied the multiplier of 5 because, at the time of accident, deceased was aged 75 years.

29. Having heard learned counsel for the parties and perused the grounds taken in the appeal vis-à-vis reasoning assigned by learned Tribunal below, while holding appellant liable to pay the compensation to respondents Nos. 1 and 2, this Court finds no merit in the present appeal, as such, same deserves to be dismissed outrightly.

30. Though, Shri Ajay Sharma, learned Senior Advocate appearing for the appellant made a serious attempt to persuade this Court to agree with his contention that since the claimants did not file claim petition alongwith their deceased father Mehar Chand, being legal heir and dependents of deceased Vidya Devi, learned Tribunal below, ought not have awarded any compensation in their favour, but, aforesaid submission made by Mr. Sharma, learned senior Advocate is totally contrary to the record. Careful perusal of record clearly reveals that the claim petition under S.166 of the Motor Vehicles Act for grant of compensation was filed jointly by Shri Mehar Chand and his two sons i.e. claimants/respondents Nos. 1 and 2. Perusal of claim petition clearly reveals that specific prayer was made on behalf of claimants including respondents Nos. 1 and 2 that they be awarded compensation to the tune of Rs.40,00,000/- on account of death of Smt. Vidya Devi. While claiming compensation, claimants in the claim

petition have specifically stated that they are sons of the deceased. Since, the claim petition, as referred to above, was filed jointly by Mehar Chand and his sons (claimants), it cannot be said that no amount, if any, could have been awarded by learned Tribunal below in favour of the claimants after death of Mehar Chand, who was husband of the deceased. Moreover, this Court finds that after the death of claimant, Mehar Chand, an application under Order XXII, rule 3 read with Order I, rule 10 CPC was filed on behalf of claimants for deletion of name of Mehar Chand from the array of parties. Perusal of zimni order dated 14.3.2017 passed by learned Tribunal below, reveals that learned counsel for the respondents got their no objection recorded, while aforesaid application was allowed by learned Tribunal below.

31. Though this court is of the view that since the claimants were petitioners alongwith their father in the claim petition, there was no requirement as such, for them to get them substituted in place of Mehar Chand, but even otherwise their impleadment at that stage never came to be objected by the appellant, rather, the appellant, while accepting the aforesaid order dated 14.3.2017, proceeded to contest the petition on merit, wherein, ultimately, it was saddled with the liability to pay compensation to claimants on account of death of their mother.

32. S. 166 of the Act clearly provides that legal representatives of a deceased can always file claim petition under the Act seeking therein compensation on account of death of the deceased, who may be father, mother, brother, sister etc. of such claimant.

33. Leaving everything aside, question with regard to maintainability of the claim petition on behalf of the claimants after death of their father never came to be raised on behalf of the appellant during the pendency of the claim petition, rather, objection with respect to maintainability, which otherwise is frivolous and has been taken at the appellate stage, cannot be permitted to be taken at this stage. Had late Mehar Chand, filed the claim petition alone, seeking therein compensation on account of death of his wife, claim being personal in nature, could have been said to have extinguished with the death of Mehar Chand but, in the case at hand, as has been noticed herein above, claimants filed claim petition alongwith their father, Mehar Chand, seeking therein compensation on account of death of their mother, as such, no error, if any, can be said to have been committed by learned Tribunal below, while awarding compensation in favour of the claimants being legal representatives of the deceased.

34. Interestingly, perusal of evidence led on record by respective parties, nowhere suggests that attempt, if any, ever came to be made on behalf of the appellant before learned Tribunal below, to carve out a case that no compensation, if any, can be awarded in favour of claimants, being legal representatives of deceased or they were not dependent upon the deceased. Hence, in view of aforesaid this Court finds no error in the impugned award, so far compensation

awarded by learned Tribunal below in favour of claimants, being legal representatives/dependents of deceased, is concerned.

35. Similarly, this Court finds no force in the submission made by learned senior Advocate that learned Tribunal below erred while applying multiplier of 5, while determining the loss of dependency. Since no evidence came to be led on record by the claimants suggestive of the fact that the deceased was 70 years of age at the time of her death, learned Tribunal below having taken note of the age mentioned in ten post-mortem report i.e. 75 years, rightly applied multiplier of 5 in terms of **Sarla Verma and others** vs. **Delhi Transport Corporation and another**, 2009 AIR(SC) 3104. In the aforesaid judgment it has been held that above 65 years of age, multiplier of 5 would apply.

36. Though, besides above, Mr. Sharma, learned senior Advocate appearing for the appellant made an attempt to carve out a case during hearing of the case that learned Tribunal below, while awarding compensation in favour of the claimants has misread and misappreciated the evidence but aforesaid plea appears to have been taken by appellant just for the sake of taking one. Otherwise also, this Court, having carefully perused the award passed by learned Tribunal below, has no hesitation to conclude that the same is based upon proper appreciation of evidence and law, as such, there is no scope for interference by this Court in the impugned award, which is accordingly upheld.

37. So far ground raised by the appellant with regard to award of interest at the rate of 9 percent per annum is concerned, this court is of the view the same is appropriate and just keeping in view the prevailing market rate. Otherwise also Recently, Hon'ble Apex Court in **Reliance General Insurance Co. Ltd.** v. **Shalu Sharma,** (2018) 2 SCC 753, awarded 9% interest and as such, this court finds no reason to interfere with the rate of interest awarded by the learned Tribunal below. The Hon'ble Apex Court in the aforesaid judgment has held as under:

> "The Tribunal has awarded a sum of Rs 3,14,335 towards medical expenses. An addition of Rs 70,000 would be required to be made in terms of the decision in Pranay Sethi (supra) on account of the conventional heads of loss of estate (Rs 15,000), loss of consortium (Rs 40,000) and funeral expenses (Rs 15,000). Hence, the total compensation is quantified at Rs 27,66,522 on which the claimants would be entitled to interest @ 9% p.a. from the date of the filing of the claim petition. The apportionment shall be carried out in terms of the award of the Tribunal. We order accordingly."

38. In view of discussion supra, present appeal is dismissed. Interim orders, if any, stand vacated. All pending applications also stand disposed of.

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

Deepak Kanwal ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 802 of 2020
Decided on July 31, 2020

Code of Criminal Procedure, 1973- Section 439 An FIR was registered for the commission of offence punishable under sections 376, 328, 354 and 120B IPC- Initially victim prosecuting while getting her statement recorded under section 154 Cr.PC no where leveled allegation , if any , of commission of offence punishable under section 376 IPC by the bail petitioner though after two months of lodging the FIR in question in her statement under section 164 Cr.PC before JMIC alleged that the bail petitioner also sexually assaulted her against her wished –Held, No plausible explanation ever came to be rendered on record with regard to delay in dis claiming name of bail petitioner- Bail petitioner allowed subject to conditions. (Paras 5 & 6)

Cases referred:

Manoranjana Sinh alias Gupta versus CBI, (2017) 5 SCC 218;
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496;
Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49;

For the petitioner	Mr. Rajiv Sharma, Advocate, through video-conferencing.
For the respondent	Mr. Sanjeev Sood, Additional Advocate General with Mr. Gaurav Sharma, Deputy Advocate General, through video-conferencing.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Bail petitioner, Deepak Kanwal, who is behind the bars since 20.7.2019, has approached this Court in the instant proceedings filed under S.439 CrPC, for grant of regular bail in respect of FIR No. 108, dated 20.7.2019, registered at Police Station, Kala Amb, District Sirmaur, Himachal Pradesh under Ss. 376, 328, 354 and 120B IPC.

2. Sequel to order dated 5.6.2020, respondent-State has filed the status report, prepared on the basis of investigation carried out by the investigating agency, perusal whereof reveals that on 19.7.2019, Police, after having received information from Women Helpline, Ambala, Haryana, reached Hotel Black Mango situate at Kala Amb, District Sirmaur, Himachal Pradesh, where, victim-prosecutrix, aged 21 years (name withheld) got her statement recorded under S.154 CrPC, alleging therein that she is resident of Karnal, Haryana and at present is working with co-accused Monika Sharma in her boutique. She alleged that the co-accused Monika Sharma, with whom she had close relationship, persuaded her to come to Himachal alongwith her friends. She alleged that the co-accused Monika told her that she would also talk to her friend, Deepak Kanwal, i.e. present bail petitioner, with regard to her job. Victim-prosecutrix

also disclosed to the Police that on 19.7.2019, at 4.00 PM, she alongwith two persons went to Kala Amb from Karnal, where co-accused Rajesh had already booked two rooms in Hotel Black Mango. Victim-prosecutrix alleged that at around 8 PM, they all went to Room No. 210, where she was made to consume cold drink containing some intoxicant, as a consequence of which, she started feeling giddy. Victim-prosecutrix also alleged that the co-accused Monika and bail petitioner left the room, whereafter, co-accused Rajesh sexually assaulted her against her wishes. Complainant further alleged that she raised alarm for help but nobody came to her rescue. She also alleged that to save herself, she locked herself in the bathroom and gave telephonic call on Women Helpline, Ambala. She disclosed to the police that after some time co-accused Monika came into the room and asked her to come out as Police had reached the Hotel in question. In the aforesaid background, FIR, detailed herein above, came to be lodged against the bail petitioner and other co-accused named herein above. Co-accused Monika Sharma stands enlarged on bail, whereas, bail petitioner and other co-accused Rajesh Kumar, are behind the bars since 20.7.2019.

3. Learned Deputy Advocate General, while fairly admitting the factum with regard to filing of *Challan* in the competent Court of law and completion of investigation 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 bail petitioner, he does not deserve any leniency rather the bail petitioner needs to be dealt with severely as such, petition may be rejected outrightly. Learned Deputy Advocate General, while making this Court peruse the status report, submits that it stands duly established on record that the bail petitioner in connivance with the co-accused, Monika Sharma, exploited the victim-prosecutrix. Learned Deputy Advocate General contends that firstly the bail petitioner brought the victim-prosecutrix to Kala Amb, with the assurance that he would provide job to her and thereafter, sexually assaulted her against her wishes, as such, he does not deserve any leniency. Lastly, learned Deputy Advocate General contends that since the bail petitioner hails from Haryana, it would be difficult to ensure his presence during trial, in the event of his being enlarged on bail.

4. Having heard learned counsel for the parties and perused the material available on record, this Court finds that initially on 19.7.2019, victim-prosecutrix, while getting her statement recorded under S.154 CrPC, though disclosed to the Police that the bail petitioner brought her to Kala Amb, but she nowhere levelled allegation, if any, of commission of offence punishable under S.376 IPC by the bail petitioner. On 19.7.2019, victim-prosecutrix alleged that both the bail petitioner and co-accused Monika left her alone in Room No. 210 in Hotel Black Mango and thereafter, co-accused Rajesh sexually assaulted her against her wishes. Careful perusal of the contents of FIR nowhere disclose commission of offence, if any, by bail

petitioner Under S.376 IPC. After two months of lodging the FIR in question, on 19.9.2019, victim-prosecutrix again got her statement recorded under S.164 CrPC before Judicial Magistrate 1st Class-I, wherein she alleged that the bail petitioner also sexually assaulted her against her wishes on 19.7.2019.

5. True it is that perusal of aforesaid statement made by victim-prosecutrix on 19.9.2019, suggests that bail petitioner also sexually assaulted her against her wishes on 19.7.2019, but it is not understood that what prevented the victim-prosecutrix from disclosing aforesaid fact to the Police on 19.7.2019, when her initial statement under S.154 CPC was recorded. Otherwise also, record pertaining to investigation nowhere suggests that between 19.7.2019 and 19.9.2019, victim-prosecutrix ever disclosed factum to the Police with regard to commission of offence, if any, under S.376 by the bail petitioner, rather, on 19.9.2019, victim-prosecutrix took a complete U turn by stating that co-accused Monika committed no wrong with her (victim-prosecutrix) rather saved her from other co-accused.

6. Having noticed aforesaid glaring aspects of the matter, this Court finds force in the submission made by learned Counsel appearing for the petitioner that no plausible explanation ever came to be rendered on record with regard to delay in disclosing name of bail petitioner so far commission of offence under S.376 IPC is concerned. At the first instance, victim-prosecutrix also levelled allegation against co-accused Monika and disclosed to the Police that she alongwith bail petitioner left her alone in Room No. 210 with co-accused Rajesh, but subsequently, as has been taken note herein above, in her statement under S.164 CrPC, gave a clean chit to Monika by stating that she saved the victim-prosecutrix from the clutches of other accused. Though, aforesaid aspects of the matter are to be considered and decided by the learned trial Court in the totality of evidence collected on record by the investigating agency, but having noticed aforesaid aspects of the matter, this court sees no reason to let the bail petitioner incarcerate in jail for an indefinite period during trial especially when nothing remains to be recovered from him. Having taken note of the fact that the victim-prosecutrix was 21 years of age at the time of alleged incident coupled with the fact that she, of her own volition, had come to Kala Amb, alongwith her friend Monika and two accused, this Court is not inclined to accept the submission made by learned Deputy Advocate General that the bail petitioner took undue advantage of innocence of the victim-prosecutrix, rather, material available on record compels this Court to draw an inference that the victim-prosecutrix being major was fully capable of understanding the consequences of her being in the company of the bail petitioner and other co-accused. Hon'ble Apex Court and this Court have repeatedly held that till the time, guilt of an individual is proved in accordance with, he/she is deemed to be innocent. In the case at hand guilt, if any, of the bail petitioner, is yet to be determined in the totality of the evidence

collected on record by the prosecution, as such, there is no justification for keeping the bail petitioner behind the bars for an indefinite period during trial.

7. This Court also cannot lose sight of the fact that there is every likelihood of further delay in trial, on account of Covid-19 pandemic, as such, there is no reason to refuse the prayer made in the present petition for grant of bail. Apprehension expressed by learned Deputy 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.

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 held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
>
> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
>
> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed

indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

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

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

10. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be

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

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

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

12. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

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

(viii) danger, of course, of justice being thwarted by grant of bail.

13. In view of above, bail petitioner has carved out a case for himself. Consequently, present petition is allowed. Bail petitioner is ordered to be enlarged on bail subject to furnishing bail bonds in the sum of Rs.2,00,000/- with one local surety in the like amount, to the satisfaction of the Investigating Officer/learned Magistrate available at the station, besides the following conditions:

(j) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

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

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

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

(n) He shall surrender passport, if any, held by him.

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 petition alone.

The petition stands accordingly disposed of.

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

Bhola Nand and another .....Petitioners

Versus

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

CWP No. 4326 of 2019
Decided on: September 15, 2020

Constitutional of India, 1950-Article 226 petitioner who have engaged on daily wage basis with effect from 1.1.1993 wee regularized within effect from 5.9.2003, thesis work change service has not been taken in to consideration for the purpose f qualifying service- Held, services rendered in the capacity of work charged employee followed by regular appointment are

to be counted as component of qualifying service for the purpose of pension and retiral benefits- Petition allowed. (Paras 4)

Cases referred:

Keshar Chand vs. State of Punjab, (1988) 94(2) PLR 223;

For the petitioners: Mr. A.K. Gupta, Advocate, through video-conferencing.

For the respondents: Mr. Ashok Sharma, Advocate General with Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General, through video-conferencing.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Petitioners have approached this Court praying therein for following main relief(s):

> "That the respondents may be ordered to take into account the work charge service rendered by the petitioners for the purpose of qualifying service an the petitioners may be granted pension from the due date with all the benefits incidental thereof..

2. Precise question for adjudication in the case at hand is "whether the work charge service rendered by the petitioner followed by regular appointment is to be counted as a component of qualifying service for the purpose of pension and other retiral benefits or not?"

3. Petitioners, who were engaged on daily wage basis with effect from 1.1.1993 were regularized with effect from 5.9.2003 as per law laid down by Hon'ble Apex Court in **Mool Raj Upadhyay**'s case. It is also not in dispute that the petitioners were also granted work charge status with effect from 1.1.2002 but since their work charge service has not been taken into consideration for the purpose of qualifying service, they have approached this Court in the instant proceedings, praying therein for the relief(s) as reproduced herein above.

4. By now, it is well settled that services rendered in the capacity of work charged employee followed by regular appointment, are to be counted as component of qualifying service for the purpose of pension and retiral benefits. Needless to say, executive instructions issued by Finance Department, Himachal Pradesh, to the contrary are not relevant in view of the decision rendered by this Court in **Skukru Ram** vs. **State of H.P. & others**, CWP No. 6167 of 2017, decided on 6.3.2013. Leaving everything aside, judgment rendered by Punjab and Haryana High Court in **Keshar Chand** vs. **State of Punjab**, (1988) 94(2) PLR 223, has also dealt with identical issue and aforesaid judgment stands upheld by Hon'ble Apex Court.

5. Division Bench of this Court in **State of Himachal Pradesh & Other** vs. **Sh. Matwar Singh & Another**, CWP No. 2384 of 2018, decided on 18.12.2018 has also taken same view hold therein 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 the light of view taken by this Court in CWP No.6167 of 2017, titled **Sukru Ram vs. State of H.P. & others**, decided rt o on 6th March, 2013. A Full Bench of Punjab and Haryana High Court in **Keshar Chand vs. State of Punjab through the Secretary P.W.D. B & R Chandigarh and others**, (**1988) 94(2) PLR 223**, also dealt with an identical issue where **Rule 3.17(ii) of the Punjab Civil Services Rules** excluded the work charge service for the purpose of qualifying service. Setting aside the said Rule being violative of **Articles 14 and 16 of the Constitution of India,** it was held that the work charge service followed by regular appointment will count towards qualifying service for the purpose of pension and other retiral benefits. The aforesaid view was also confirmed by the Hon'ble Apex Court."

6. Consequently, in view of above, present petition is allowed. Respondents are directed to take into account services rendered by the petitioners on work charge basis for the purpose of pension and retiral benefits and grant them all benefits incidental thereto. Pending applications, if any, also stand disposed of.

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

Abdul Rehman ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

Cr. MP (M) No. 1103 of 2020
Decided on July 31, 2020

Code of Criminal Procedure, 1908- Section 439- Petitioner has filed bail application in FIR No. 59 dated 16-5-2020 under sections 379, 188, 269, 270 & 411 read with section 341 IPC, P.S Puruwala District Sirmour- Held, that cow allegedly stolen from the dairy of the complainant recovered- Guilt of the petitioner yet ot be determined based on the evidence collected- Charge sheet (Challan) filed in the court- No further recovery to be effected from the petitioner- Freedom of en individual can not be curtailed for an indefinite period, especillay when his/her guilt is yet to be proved – Other principals at the time of grant of bail like nature of accusation, nature of evidence collected, severity of punishment to be kept in mind- Petitioner has carved out a case for enlargement on bail- Petition allowed.. (Paras 4, 6, 7 & 10)

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 versus Ashis Chatterjee and another (2010) 14 SCC 496;

For the petitioner	Mr. Vinod Chauhan, Advocate, through video-conferencing.
For the respondent	Mr. Sanjeev Sood, Additional Advocate General with Mr. Gaurav Sharma, Deputy Advocate General, through video-conferencing.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Bail petitioner, Abdul Rehman, who is behind the bars since 17.5.2020, has approached this Court in the instant proceedings filed under S.439 CrPC, for grant of regular bail in respect of FIR No. 59, dated 16.5.2020 under Ss. 379, 188, 269, 270, 411 and 34 IPC registered at Police Station Puruwala, District Sirmaur, Himachal Pradesh.

2. Status report filed by the respondent-State in terms of orders dated 9.7.2020 and 23.7.2020 reveals that on 15.5.2020, complainant, Partap Singh Chauhan, lodged a complaint at Police Station Puruwala, District Sirmaur, alleging therein that his two cows and a calf have been stolen by some unknown person from his dairy near Forest Colony, as such, appropriate action may be taken in the matter. Allegedly, on 16.5.2020, Police recovered one black coloured cow from the house of Dilshad. During investigation, Police found that the bail petitioner had tethered the cow allegedly stolen by him from the dairy of the complainant in the premises of co-accused Dilshad. Police also found during investigation that the bail petitioner alongwith his two accomplices, Ashraf and Meharbaa alias Mathoo, came from Uttrakhand through river and thereafter, stole cows from the dairy of the complainant. On the basis of aforesaid investigation, FIR, detailed herein above, came to be lodged against the bail petitioner and other co-accused namely Dilshad, Ashraf and Meharban alias Mathoo. All the accused, save and except the bail petitioner stand enlarged on bail. Present bail petitioner had also approached Judicial Magistrate 1st Class-II, Paonta Sahib, for grant of bail, but same was rejected.

3. Learned Deputy Advocate General, while making this Court peruse the status report /record contends that keeping in view the gravity of offence alleged to have been committed by bail petitioner, he does not deserve any leniency rather the bail petitioner needs to be dealt with severely as such, petition may be rejected outrightly. Learned Deputy Advocate General further contends that it is apparent from the record that the bail petitioner had been indulging in such activities in the past also, as such, it would not be in the interest of justice to enlarge him on bail, because in the event of being enlarged on bail, bail petitioner may not only flee from justice but will also indulge in such activities again.

4. Having heard learned counsel for the parties and perused the material available on record, this Court finds that the cow allegedly stolen from the dairy of the complainant, was recovered from the house of co-accused Dilshad, who otherwise stands enlarged on bail. There is nothing on record suggestive of the fact that the cow allegedly stolen from the dairy of the complainant was recovered from the possession of the bail petitioner as such, guilt, if any, of the bail petitioner is yet to be determined in the totality of the evidence collected on record by the prosecution. *Challan* stands filed in the competent Court of law and nothing remains to be recovered from the bail petitioner, as such, this Court sees no reason to let the bail petitioner incarcerate in jail for an indefinite period during trial. No doubt, record suggests that in the past also, bail petitioner had been indulging in such activities but, mere pendency of case, wherein guilt, if any, of the bail petitioner is yet to be established on record, may not be a ground for this Court to refuse bail in the case at hand. Hon'ble Apex Court and this Court have repeatedly held that till the time, guilt of an individual is proved in accordance with, he/she is deemed to be innocent. In the case at hand guilt, if any, of the bail petitioner, is yet to be determined in the totality of the evidence collected on record by the prosecution, as such, there is no justification for keeping the bail petitioner behind the bars for an indefinite period during trial. This Court also cannot lose sight of the fact that till date charge has not been framed against the bail petitioner and there is every likelihood of further delay in trial, on account of Covid-19 pandemic, as such, there is no reason to refuse the prayer made in the present petition for grant of bail. Apprehension expressed by learned Deputy 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.

5. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

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

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

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

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

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be

> innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

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

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

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness

of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

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

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

10. In view of above, bail petitioner has carved out a case for himself. Consequently, present petition is allowed. Bail petitioner is ordered to be enlarged on bail subject to furnishing bail bonds in the sum of Rs.2,00,000/- with one local surety in the like amount, to the satisfaction of the Investigating Officer/learned Magistrate available at the station, besides the following conditions:

(o) 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;

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

(q) 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

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

(s) He shall surrender passport, if any, held by him.

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

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

The petition stands accordingly disposed of.

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

Joginder Singh .....Petitioner

Versus

The State of Himachal Pradesh and others ...Respondents

CWPOA No. 4544 of 2019
Decided on August 18, 2020

Constitution of India, 1950-Article 226, Grants under Grant-In-Aid to Parent-Teacher Association Rules, 2006 discontinued in school located in Municipal Corporation, Municipal Committees and Nagar Panchayats vide communication dated 27.8.2007- Challenged- Held, that petitioner appointed Lecturer by PTA after following due procedure- As per Grant-In-Aid, Rules 2006, grant in released to the PTA who engaged teacher- Clarification made on the basis of grant-in Aid discriminatory and violative of articles 14 & 16 of constitution- Grant-In-Aid, Rules provide no rider that benefit of Grant-in-Aid would not be given to PTA teacher in urban areas- PTA/SMC teacher appointed after communication dated 27.8.2007 in urban areas are in receipt of Grant-In-Aid- Petitioner discriminated without plausible reason- Communication dated 27.8.2007 quashed and set aside- Petition allowed.

Cases referred:
S. Seshachalam and Ors. vs. Chairman, Bar Council of T.N. & Ors, (2014) 16 SCC 72;
Deepak Sibal vs. Punjab University (1989) 2 SCC 145;

For the petitioner: Mr. N.D. Sharma, Advocate, through video-conferencing.

For the respondent: Mr. Sudhir Bhatnagar, Additional Advocate General, through video-conferencing.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with the communication dated 27th August, 2007 (Annexure P-3), issued by the respondents, whereby grants under Grant-in-Aid to Parent-Teacher Associations Rules, 2006 came to be discontinued in respect of schools located in Municipal Corporations, Municipal Committees and Nagar Panchayats of the State, petitioner

has approached this Court in the instant petition filed under Art. 226 of the Constitution of India, praying therein for following relief:

"(i) That the letter no. END-H(5)C(10)17/2006-7 dated 27.8.2007, Annexure P-3 may kindly be quashed and set-aside being unreasonable, uncalled for and violative of Constitution of India.

(ii) That the grant-in-aid which the respondent no. 3 i.e. Parents Teacher Association Government Senior Secondary School Rajgarh, District Sirmour, Himachal Pradesh is entitled may be continued and similar other schools which falls within the limits of Municipal Corporation, Municipal Committees and Nagar Panchayat may also be grant-in-aid by the State of Himachal Pradesh as had been granted here-to-before.

2. For having a bird's eye view of the matter, certain undisputed facts as emerge from the pleadings of the parties, are that the petitioner after having passed his M.Com., applied for the post of Lecturer Commerce, pursuant to an advertisement issued by respondent No.3. It is also not in dispute that interview for the post of Lecturer in Commerce subject at Government Senior Secondary School, Rajgarh, District Sirmaur, Himachal Pradesh was conducted strictly as per guidelines laid down in the Education Code by a duly constituted Committee of Parent-Teacher Association. On the basis of his performance in the interview, petitioner was offered appointment as Lecturer (Commerce) vide office order dated 6.10.2007 (Annexure P-2) by respondent No.3. As per terms and conditions contained in the aforesaid letter, respondent No.3 agreed to pay to the petitioner Rs.3,000/- per month and petitioner joined as PTA Lecturer in the subject of Commerce at Government Senior Secondary School, Rajgarh, District Sirmaur, with effect from 9.10.2007. However, fact remains that before the petitioner had joined his services as Lecturer of Commerce at Government Senior Secondary School Rajgarh, Government of Himachal Pradesh, Department of Higher Education, vide communication dated 27.8.2007 (Annexure P-3) conveyed the decision of the Government to discontinue the grants under Grant-in-Aid to Parent-Teacher Associations Rules, 2006 to the schools located in Municipal Corporation, Municipal Committees and Nagar Panchayats of the State. However, vide aforesaid communication, respondents clarified that the grants under Grant-in-Aid Rules shall continue in respect of Government Colleges located in the aforesaid areas. In this background, petitioner has approached this Court in the instant proceedings praying therein to quash and set aside aforesaid communication (Annexure P-3) being discriminatory and violative of Arts. 14 and 16 of the Constitution of India.

3. Having heard learned counsel for the parties and perused the material available on record, especially the reply filed by the respondents-State, this Court finds that there is no dispute inter se parties as far as appointment of the petitioner on the post of Lecturer in the subject of Commerce by respondent No.3 is concerned. Similarly, there is no dispute that prior

to issuance of communication dated 27.8.2007 (annexure P-3), Schools located in Municipal Corporation, Municipal Committees and Nagar Panchayats were being released grant under Grant-in-Aid Rules, 2006. Vide aforesaid communication, though Higher Education Department decided to discontinue the grants earlier being given to the Schools located in Municipal Corporation, Municipal Committees and Nagar Panchayats of the State but no specific reason/explanation has been assigned in the communication in question for continuing said grants in respect of Government Colleges located in the same areas. Though, careful perusal of aforesaid communication discloses no reason for discontinuing grants under Grant-in-Aid Rules but respondents, in their reply to the petition, have stated that the decision not to release grants has been taken in view of the fact that the Schools situate in urban areas are mostly manned by regular teachers, whereas, grant to PTA provided teachers is applicable only to those teachers, who are working out of municipal areas of the State, where most of posts are lying vacant. Besides above, respondents, in their reply, have stated that the petitioner was engaged on 6.10.2007 by the PTA (respondent No.3), as such, Grant-in-Aid cannot be given to the petitioner and it is only for the PTA concerned, to pay the due and admissible salary out of its own funds. Apart from above, no cogent and convincing reason has been assigned by the concerned Department, while carving out a distinction between the schools located in urban areas like Municipal Corporation, Municipal Committees and Nagar Panchayats and schools located in rural areas. Very purpose of authorizing PTA to appoint teachers in the schools is/was to ensure that no post of teacher remains vacant and in this process, Government further with a view to ensure filling up of vacancies of teachers in the schools situate in rural areas, made provision for grants under Grant-in-Aid Rules, 2006. Respondents, in their reply have categorically admitted that as per Grant-in-Aid Rules, 2006, grant is released to the PTA, who made teacher available to the educational institutions for the purpose of imparting education to its students, as such, respondents, in the case at hand, are not justified in stating that since the petitioner came to be appointed by PTA, his due and admissible salary would be paid by the PTA concerned. Besides above, respondents have stated in their reply that Government has released Grant-in-Aid to those institutions, where teachers are engaged after following proper procedure by the concerned PTA. In the case at hand, no material worth credence has been placed on record by the respondents indicative of the fact that petitioner was not appointed after following due procedure or that he does not possess the essential qualifications for holding the post in question.

4. Leaving everything aside, decision dated 27.8.2007, as contained in annexure P-3, taken by the respondents is otherwise not sustainable in the eyes of law being discriminatory and arbitrary. Vide aforesaid communication, teachers, appointed by PTA in the

Schools located in Municipal Corporation, Municipal Committees and Nagar Panchayats have been denied Grant-in-Aid whereas, teachers working in Colleges in these areas have been held entitled to Grant-in-Aid.

5. Classification made on the basis of rural and urban areas of the State for grant of Grant-in-Aid under Grant-in-Aid Rules, 2006 is definitely discriminatory and violative of Articles. 14 and 16 of the Constitution of India. Vide communication dated 27.8.2007, respondents have made a classification, which is unreasonable and uncalled for and does not fulfill Constitutional requirements. Grant under Grant-in-Aid Rules has been stopped only in respect of the Schools located in Municipal Corporation, Municipal Committees and Nagar Panchayats. Since teachers working in Government colleges located in these areas have been held entitled for grant, classification made by the State is unreasonable and unsustainable in the eye of law. There is no reasonable nexus with the object sought to be achieved by making such classification by the State depriving Grant-in-Aid in respect of PTAs upto the standard of Government Senior Secondary Schools, whereas, same has been decided to be continued in respect of Colleges located in these areas.

6. Otherwise also, bare perusal of the policy dealing with grants under Grant-in-Aid Rules provides no rider that benefit Grant-in-Aid would not be given to PTA teachers appointed in urban areas. No doubt, Grant-in-Aid Rules came into force in the year 2006 and appointment of the petitioner is of the year 2007 on the basis of Grant-in-Aid Rules but the fact remains that the PTA Lecturers appointed prior to 28.2.2007 in Corporation/Committee/Nagar Panchayat areas are still in receipt of Grant-in-Aid as is evident from the perusal of communication dated 9.10.2007 (Annexure P-4), as such, there is no reason to discriminate between incumbents who were offered appointment as PTA lecturer on the date of stoppage of Grant-in-Aid Rules, that too on the basis of their dates of appointments. Careful perusal of annexure P-4 reveals that the respondents kept on releasing Grant-in-Aid to PTA teachers appointed after 27.8.2007 irrespective of their areas of working, be it urban or rural.

7. Though, as per reply filed by the respondents, PTA Lecturers appointed in urban areas like Municipal Corporation, Municipal Committee or Nagar Panchayat are not entitled for Grant-in-Aid but said action of the respondents is not sustainable in view of the fact that PTA teacher appointed in these very areas prior to 27.7.2007 are still in receipt of Grant-in-Aid as such, impugned annexure P-3, dated 27.8.2007 deserves to be quashed and set aside being illegal and arbitrary.

8. By way of miscellaneous application i.e. CMP-T No. 1647 of 2020, wherein prayer came to be made on behalf of the petitioner for early hearing of the matter, petitioner also placed on record information received by the petitioner under Right to Information Act,

perusal whereof reveals that PTA/SMC teachers appointed in urban areas after issuance of communication dated 27.8.2007 are in receipt of Grant-in-Aid, as such, learned Counsel appearing for the petitioner is right in contending that the petitioner has been discriminated without there being any plausible reason. It is quite apparent from the record that the concerned Department, while releasing grants in terms of Grant-in-Aid Rules, has adopted a policy of 'pick and choose', which is not permissible under law.

9. It is well settled law that as per Art. 14 of the Constitution of India, only one policy should be applied by the Government throughout the State and as such, benefit of Grant-in-Aid should granted to either all similarly situate persons or declined to all but definitely the respondent being a 'welfare State', cannot be allowed to resort to 'pick and choose' policy.

10. In the case at hand, teachers teaching in Government colleges in Municipal Corporation, Municipal Committees and Nagar Panchayats have been released Grant-in-Aid whereas teachers working in schools in these areas have been denied the same, for no plausible justification, as such, action of the respondents being totally discriminatory and arbitrary deserves to be quashed and set aside.

11. Teachers working either in the schools or colleges are performing same duties i.e. imparting education to the students, as such, approach of the respondent State in discontinuing Grant-in-Aid in respect of teachers teaching in the Schools running in urban areas and continuing the same to the teachers of Government college in these very areas is sans rationale, thus, such decision of the respondent-State cannot legally sustain being violative of Arts. 14 and 16 of the Constitution of India.

12. Hon'ble Apex Court in **S. Seshachalam and Ors.** vs. **Chairman, Bar Council of T.N. & Ors**, (2014) 16 SCC 72, has categorically held that Article 14 states that, "the State shall not deny to any person equality before the law of the equal protection of the laws within the territory of India." Article 14 forbids class legislation but not reasonable classification. The classification however must not be arbitrary, artificial or evasive but must be based on some real and substantial bearing, a just and reasonable relation to the object sought to be achieved by the legislation. Article 14 applies where equals are treated differently without any reasonable basis. Article 14 does not apply where equals and unequals are treated differently. Class legislation is that which makes an improper discrimination by conferring particular privileges upon a class of persons arbitrarily selected from a large number of persons all of whom stand in the same relation to the privilege granted and between those on whom the privilege is conferred and the persons not so favoured, no reasonable distinction or substantial difference can be found justifying the inclusion of one and exclusion of the other from such privilege.

13. Hence, this Court has no hesitation to conclude that decision of the respondent-State to stop Grant-in-Aid in respect of teachers teaching in Schools located in urban areas and to continue in case of the teachers teaching in Government Colleges in the same area, is not based upon intelligible differentia and has no reasonable nexus with the object sought to be achieved and same suffers from arbitrariness..

14. Hon'ble Apex Court in **Deepak Sibal** vs. **Punjab University** (1989) 2 SCC 145, has also held that Article 14 forbids class legislation but not reasonable classification. Whether classification is permissible under Article 14 or not, two conditions must be fulfilled i.e. (1) classification must be on the basis of intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (2) that differentiation must have a rational nexus with the object sought to be achieved by the legislation in question.

15. In the aforesaid judgment, it has been held that in order to consider question as to reasonableness of the classification, it is necessary to take into account objectives for said classification, if the objective be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable. It would be apt to take note of following paragraphs of judgment rendered by Hon'ble Apex Court in **Deepak Sibal** (supra) :

> "9. It is now well settled that Article 14 forbids class legislation, but does not forbid reasonable classification. Whether a classification is a permissible classification under Article 14 or not, two conditions must be satisfied, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (2) that the differentia must have a rational nexus to the object sought to be achieved by the statute in question.
>
> 10. By the impugned rule, a classification has been made for the purpose of admission to the evening classes. The question is whether the classification is a reasonable classification within the meaning of Article 14 of the Constitution. In order to consider the question as to the reasonableness of the classification, it is necessary to take into account the objective for such classification. It has been averred in the written statement of Dr. Balram Kumar Gupta, Chairman, Department of Laws, Punjab University, the respondent No. 2, filed in the High Court, that the object of starting evening classes was to provide education to bona fide employees who could not attend the morning classes on account of their employment. The object, therefore, was to accommodate bona fide employees in the evening classes, as they were unable to attend the morning classes on account of their employment. Admission to evening classes is not open to the employees in general including private sector employees, but it is restricted to regular employees of Government/Semi-Government institutions etc., as mentioned in the impugned rule. In other words, the employees of Government/Semi-Government institutions etc. have been grouped together as a class to the exclusion of employees of private establishments.

14. It is difficult to accept the contention that the Government employees or the employees of Semi-Government and other institutions, as mentioned in the impugned rule, stand on a different footing from the employees of private concerns, in so far as the question of admission to evening classes is concerned. It is true that the service conditions of employees of Government/Semi-Government institutions etc, are different, and they may have greater security of service, but that hardly matters for the purpose of admission in the evening classes. The test is whether the employees of private establishments are equally in a disadvantageous position like the employees of Government/Semi-Government institutions etc. in attending morning classes. There can be no doubt and it is not disputed that both of them stand on an equal footing and there is no difference between these two classes of employees in that regard. To exclude the employees of private establishments will not, therefore, satisfy the test of intelligible differentia that distinguishes the employees of Government/Semi-Government institutions etc. grouped together from the employees of private establishments. It is true that a classification need not be made with mathematical precision but, if there be little or no difference between the persons or things which have been grouped together and those left out of the group, in that case, the classification cannot be said to be a reasonable one.

15. It is, however, submitted on behalf of the respondents that the employees of private establishments have been left out as it is difficult for the University to verify whether or not a particular candidate is really a regular employee and whether he will have a tenure for at least three years during which he will be prosecuting his studies in the Three-Year LL.B. Degree Course. It is submitted that in making the classification, the surrounding circumstances may be taken into account. In support of that contention, much reliance has been placed on the decision of this Court in Shri Ram Krishna Dalmia v. Justice S.R. Tendolkar[1]. In that case, it has been observed by Das, C.J. that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. It follows from the observation that surrounding circumstances may be taken into consideration in support of the constitutionality of a law which is otherwise hostile or discriminatory in nature. But the circumstances must be such as to justify the discriminatory treatment or the classification subserving the object sought to be achieved. In the instant case, the circumstances which have been relied on by the respondents, namely, the possibility of production by them of bogus certificates and insecurity of their services are not, in our opinion, such circumstances as will justify the exclusion of the employees of private establishments from the evening classes.

20. In considering the reasonableness of classification from the point of view of Article 14 of the Constitution, the Court has also to consider the objective for such classification. If the objective be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable. In the instant case, the foregoing discussion reveals that the classification of the employees of Government/Semi-Government institutions etc. by the impugned rule for the purpose of admission in the evening classes of Three-Year LL.B. Degree Course to the exclusion of all other employees, is unreasonable and unjust, as it does not subserve any fair and logical objective. It is, however, submitted that classification in favour of Government and public sector is a reasonable and valid classification. In support of that contention, the decision in Hindustan Paper Corpn. Ltd. v. Government of Kerala[4], has been relied on by the learned Counsel for the respondents. In that case, it has been observed that as far as Government undertakings and companies are concerned, it has to be held that they form a class by themselves, since any project that they may make would in the end result in the benefit to the members of the general public. The Government and public sector employees cannot be equated with Government undertakings and companies. The classification of Government undertakings and companies may, in certain circumstances, be a reasonable classification satisfying the two tests mentioned above, but it is difficult to hold that the employees of Government/Semi-Government institutions etc., as mentioned in the impugned rule, would also constitute a valid classification for the purpose of admission to evening classes of Three-Year LL.B. Degree Course. The contention in this regard, in our opinion, is without any substance.

23. The principle laid down in Chitra Ghosh's case has been reiterated by this Court in a later decision in D.N. Chanchala v. State of Mysore[6]. It has been very clearly laid down by this Court that Government colleges are entitled to lay down criteria for admission in its own colleges and to decide the sources from which admission would be made, provided of course, such classification is not arbitrary and has a rational basis and a reasonable connection with the object of the rules. Thus, it is now well established that a classification by the identification of a source must not be arbitrary, but should be on a reasonable basis having a nexus with the object sought to be achieved by the rules for such admission."

16. In view of the detailed discussion made supra, petition at hand succeeds and is allowed. Annexure P-3, dated 27.8.2007 is quashed and set aside. Respondents are directed to release due and admissible Grant-in-Aid in favour of the petitioner from the date due and continue releasing the same in favour of the petitioner. All pending applications also stand disposed of.

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

Balak Ram .....Petitioner

Versus

Secretary (Forests) to the Government of Himachal Pradesh and others ...Respondents

CWPOA No. 5637 of 2019
Reserved on: September 15, 2020
Decided on: September 17, 2020

Constitution of India, 1950-Article 226- Petitioner granted work charge status w.e,f. 1.1. 2002 having worked in respondent department for requisite period- After release of arrear on account of grant of work charge status, recovery of arrears in excess of three years ordered to be paid to the petitioner sought- Challenged- Held, that Jai Dev Gupta's case is judgment in personam and not judgment in rem and not applicable to present case- No general principal laid to pay arrears for three years prior to filing of the petition- Pursuant to grant of work charge status, arrears of the respondents to recover subsequent action for the respondent to recover the same not legal and justifiable- Instructions of Finance Department to restrict the arrears to three years can not be made applicable- Petition allowed- Respondents directed to release entire amount of arrears as calculated to the petitioner with up to date interest. (Paras 11, 17 & 18).

For the petitioner: Mr. M.L. Sharma, Advocate, through video-conferencing.

For the respondents: Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General, through video-conferencing.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Being aggrieved and dissatisfied with decision of the respondents to recover a sum of Rs.1,47,746/- paid to the petitioner as arrears on account of grant of work charge status, petitioner at the first instance approached erstwhile Himachal Pradesh Administrative Tribunal by way of OA No. 3516 of 2015, which now stands transferred to this Court and re-registered as CWPOA No. 5637 of 2019, praying therein for the following reliefs:

> "i) to direct the respondents to make payment of the pending instalaments as done in the case of the persons mentioned in para-6(v) of the petition."

7. For having bird's eye view of the matter, certain undisputed facts as emerge from pleadings adduced on record by the respective parties are that the petitioner was initially appointed as a Mali in the Forest Department on daily wage basis on 1.3.1992 and after having

rendered ten years' continuous service with 240 days in each calendar year on 1.1.2002, became eligible for grant of work charge status in terms of judgment rendered by Hon'ble Apex Court in celebrated case of **Mool Raj Upadhyay**. Since the respondents failed to grant aforesaid benefit in favour of the petitioner, despite there being clear cut mandate issued by Hon'ble Apex Court in **Mool Raj Upadhyay** (supra), he was compelled to approach this Court by way of CWP no. 5211 of 2010, titled Balak Ram vs. State of Himachal Pradesh and others. This Court, vide judgment dated 26.8.2010, disposed of the petition with a direction to the respondents to take a final decision in light of judgment (supra).

8. In compliance to aforesaid judgment, work charge status came to be conferred upon the petitioner with effect from 1.1.2002 vide letter dated 13.12.201 (Annexure R-1). Arrears on account of grant of work charge status for the period 1.1.2002 to 31.5.2011 were also calculated by the Department concerned on the basis of clarification given by the Finance Department, conveyed vide letter No. FFE-A(E)2-1/2008-II dated 11.7.2011. It is also not in dispute that pursuant to aforesaid financial sanction given by the Department concerned, petitioner was paid a sum of Rs.2,03,405/- in three installments of Rs.67,801, 67,802 and 67,803. However, after release of aforesaid amount to the petitioner, respondent Department as per instructions of the Finance Department conveyed by Principal Secretary (Forests) to the Government of Himachal Pradesh, vide letter dated 8.3.2013 (Annexure R-7), ordered that the arrears in excess of three years, ordered to be paid to the petitioner, are required to be recovered in terms of judgment rendered by Hon'ble Apex Court in **Jai Dev Gupta** (AIR 1998 SC 2819). In the aforesaid background, petitioner has approached this Court by way of instant petition, praying therein for the relief, as reproduced herein above.

9. Having heard learned counsel for the parties and perused the material available on record, the question which surfaces to the fore for adjudication by this Court is, "whether the respondents are legally competent to recover the amount already paid to the petitioner as arrears on account of grant of work charge status for the period with effect from 1.3.2002 to 31.5.2011 and to stop the further payment in terms of instruction of Finance Department, Himachal Pradesh, conveyed vide letter dated 8.3.2013 (Annexure R-7), especially when such amount was sanctioned by Finance Department, Himachal Pradesh in favour of the petitioner on account of arrears on grant of work charge status. Since, there is no dispute *inter se* parties that the petitioner, after having rendered service on daily wage basis for requisite period, had become entitled for grant of work charge status and such benefit stands extended to the petitioner with effect from 1.3.2002 vide Annexure R-1, there appears to be no occasion for this Court to go into that aspect of the matter, especially when there is no challenge, if any, to the same by either of the parties. Similarly, there is no dispute that Government of Himachal

Pradesh held the petitioner entitled to a sum of Rs.3,39,007/- as arrears on account of grant of work charge status for the period with effect from 1.3.2002 to 31.5.2011 vide Annexure R-3, dated 22.2.2012.

10. Grouse of the petitioner in the case at hand, is that once respondent Department, in compliance of judgment dated 26.8.2010 passed by a Division Bench of this Court in CWP No. 5211 of 2010, had decided to confer upon the petitioner work charge status with effect from 1.1.2002 and had sanctioned a sum of Rs.3,39,007/- vide communication dated 22.2.2012, no recovery, if any, could have been effected from him on the strength of instructions of the Finance Department conveyed vide letter dated 8.3.2013 by Principal Secretary (Forests) to the Government of Himachal Pradesh (Annexure R-7), wherein it has been held that arrears in excess of three years period so released are required to be recovered in terms of judgment rendered by Hon'ble Apex Court in **Jai Dev Gupta** (supra). By way of fresh calculations, petitioner has been held entitled to a sum of Rs.55,665/- on account of arrears, but since he has been already released substantial amount in three installments, amount of Rs.1,47,746/- paid in excess, now is sought to be recovered by the respondents in terms of instructions issued by Finance Department.

11. Before adverting to the factual matrix of the case vis-à-vis prayer made in the instant petition, this Court deems it fit to take note of judgment rendered by Hon'ble Apex Court in **Jai Dev Gupta**, which is as under:

> "The appellant approached the central Administrative Tribunal for the relief that he is entitled to the pay-scale of Lecturer in Commercial arts though he was appointed to the post of 'Studio Artist'. In addition to that he claimed the difference in the salary from the year 1971. He approached the Tribunal for this relief in May. 1989. The Tribunal accepted the claim of the appellant that he should be paid the salary of Lecturer in Commercial Arts though he was appointed to the post of 'Studio Artist' in View of the fact that he was performing the duties of Lecturer in Commercial Arts. However, the Tribunal granted the relief of difference in backwages from May, 1988 only on the ground that under Section 21of the Administrative Tribunals Act the period of one year is prescribed for redressal of grievances. Against the decision of the Tribunal that the appellant is entitled to be paid the salary of Lecturer in Commercial Arts though he was appointed as 'Studio Artist' the respondents have not filed any appeal. The appellant has preferred this appeal claiming the difference in backwages from the date of his posting as Lecturer in Commercial Arts.
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> 2. Learned counsel appearing for the appellant submitted that before approaching the Tribunal the appellant was making number of representations to the appropriate authorities claiming the relief and that was the reason for not approaching the Tribunal earlier than May, 1989. We do not

> think that such an excuse can be advanced to claim the difference in backwages from the year 1971. In Administrator of Union Territory of Daman and Diu & Ors. Vs. R.D. Valand 1995 Supp(4) SCC 593 this court while setting aside an order of Central Administrative Tribunal has observed that the Tribunal was not justified in putting the clock back by more than 15 years and the Tribunal fell into patent error in brushing aside the question of limitation by observing that the respondent has been making representations from time to time and as such the limitation would not come in his way. In the light of the above decision, we cannot entertain the arguments of the learned counsel for the appellant that the difference in backwages should be paid right from the year 1971. At the same time we do not think that the Tribunal was right in invoking section 21 of the Administrative Tribunals Act for restricting the difference by backwages by one year.
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> 3. In the facts and circumstances of the case, we hold that the appellant is entitled to get the difference in backwages from May, 1986. The appeal is disposed of accordingly with no order as to costs.

12. Careful perusal of aforesaid judgment rendered by Hon'ble Apex Court, clearly reveals that the same cannot be made applicable to the case of the petitioner. Facts in **Jai Dev Gupta**'s case reveal that the petitioner in that case approached Central Administrative Tribunal for the relief that he is entitled to pay scale of Lecturer in Commercial Arts though he was appointed to the post of Studio Artist. Apart from above, petitioner in that case claimed difference in salary from the year 1971 but since for said relief, petitioner approached the Tribunal in the year 1989, as such, Tribunal, while granting relief to the petitioner, restricted the back wages upto May, 1988 on the ground that under S.21 of the Administrative Tribunals Act, the period of one year is prescribed for redressal of grievance. Against the aforesaid decision of the Tribunal, petitioner in that case approached Hon'ble Apex Court. Hon'ble Apex Court, having taken note of the plea of the petitioner that before approaching Tribunal, he made a number of representations to the appropriate authorities claiming the relief, ruled that such excuses cannot be advanced to claim difference in backwages from the year 1971. While placing reliance upon judgment rendered in case Administrator of Union Territory of Daman and Diu v. R.D. Valand, 1995 Supp (4) SCC 593, wherein Hon'ble Apex Court, while setting aside order of Central Administrative Tribunal, had observed that the Tribunal was not justified in putting the clock back by more than 15 years and that the Tribunal fell into patent error by brushing aside question of limitation by observing that the respondent has been repeatedly representing to the Department, and as such, plea of limitation will not arise, rejected the prayer made on behalf of the petitioner in that case that difference in backwges should be paid right from the year 1971. Apart from above, Hon'ble Apex Court while holding that the Tribunal was not right in invoking S.21 of the Administrative Tribunals Act for restricting backwages for a period of one year, held

the petitioner in that case entitled to differences in backwages from the year 1986 i.e. three years prior to filing of the petition.

13. Having carefully perused the aforesaid judgment rendered by Hon'ble Apex Court in **Jai Dev Gupta**, this Court finds force in the submission of Mr. M.L. Sharma, learned Counsel appearing for the petitioner that the judgment rendered by Hon'ble Apex Court is a *judgment in personam* and not a *judgment in rem* and as such could be made applicable to each and every case, especially in the case of the petitioner for effecting recovery of amount already calculated by the respondent authorities as arrears on account of grant of work charge status for the period 1.3.2002 to 31.5.2011. If the judgment rendered by Hon'ble Apex Court is read in its entirety, observations and findings returned therein are specifically with reference to provisions contained under S.21 of the Administrative Tribunals Act, which prescribe one year limitation for redressal of grievance.

14. In **Jai Dev Gupta**'s case, tough the Hon'ble Apex Court restricted the claim of the petitioner for three years having taken note of the fact that he approached the Tribunal beyond the prescribed period of limitation i.e. after 18 years but, at no point of time, laid down any general principle that in all other cases, claimants/petitioners if entitled, would be paid arrears for three years prior to filing of the petition in the court of law.

15. There cannot be any quarrel with the proposition that the Department/organisation liable to pay some amount can pray for restricting the claim for a period of three years while placing reliance upon aforesaid judgment rendered in **Jai Dev Gupta** case, wherein admittedly Hon'ble Apex Court having taken note of delay of 18 years, restricted the claim of the petitioner for a period of three years but, if no such restriction is ever put by the court, while holding petitioner/claimant entitled for the benefits, the Department/organisation liable to pay the amount, of its own, cannot effect recovery or deduct the amount, on the basis of the judgment rendered by Hon'ble Apex Court in **Jai Dev Gupta**.

16. In the case at hand, work charge status came to be conferred upon the petitioner with effect from 1.1.2002 by the Department in compliance to judgment rendered by a Division Bench of this Court on 26.8.2010 in CWP No. 5211 of 2010. Pursuant to grant of work charge status to the petitioner, respondent Authorities calculated arrears on account of grant of work charge status to the tune of Rs.3,39,007/- and thereafter, released three installments of Rs.68,701, Rs.68,702/- and Rs.68,702/-, as such, subsequent action of the respondents, whereby amount already paid to the petitioner as arrears on account of grant of work charge status is sought to be recovered, cannot be said to be legal and justifiable , especially when it stands established on record that the respondent authorities having found petitioner entitled to work charge status sanctioned a sum of Rs.3,39,007/- in his favour.

17. Though, for the reasons stated in earlier part of the judgment, this Court is of the definite view that the Finance Department could not have issued any instructions for effecting recovery of amount paid on account of arrears, if any, to the employees on account of their being conferred work charge status or regularisation, on the basis of judgment rendered in **Jai Dev Gupta**'s case, but even otherwise, said Notification came to be issued in the year 2010, as such, cannot be made applicable to the cases which otherwise stood decided prior to issuance of said instructions. Since no specific challenge has been laid to the aforesaid instructions of Finance Department, whereby decision has been taken to restrict the arrears to three years in the instant petition, this Court would refrain itself from quashing the same in the instant proceedings. however, having taken note of the communication dated 11.7.2011 (Annexure R-2), issued by Additional Chief Secretary (Forests) to Principal Chief Conservator of Forests, Himachal Pradesh, wishes to observe that the officers manning responsible posts in the Government do not bother to look into/peruse the opinion rendered by the Law Department, whose duty is otherwise to advise the Government in legal matters. Communication dated 11.7.2011 (Annexure R-2) annexed with the reply filed by respondents Nos. 1 to 3 reveals that the office of Additional Chief Secretary (Forests) to the Government of Himachal Pradesh, after having received clarification from the Finance Department, clarified to the office of Principal Chief Conservator of Forests, Himachal Pradesh that the judgment rendered by Hon'ble Apex Court in **Jai Dev Gupta**'s case needs to be taken as additional pleading, while defending/preferring various petitions in the courts, so as to restrict the financial liability, however, to restrict financial liability, it cannot be used to subvert and misinterpret any court order. Hence, Department is advised to implement the court order in its entirety. Besides above office of Additional Chief Secretary (Forests) to the Government of Himachal Pradesh, in the aforesaid communication, further clarified that the matter was taken up with the Law Department, which has opened as under:

> ".. this department is of the considered opinion that in the cases of instant retrospective regularization, especially on the basis of Mool Raj Upadhaya's case of the Hon'ble Supreme Court, the ratio of the Jai Dev Gupta's case can not be imported as spelt out above. The A.D. is therefore advised to act strictly as per scheme of the pinion dated 21.1.2008 supra. However, it would not be out of place to mention there that the scheme of the Mool Raj Upadhaya's case is being followed & implemented by all the administrative Departments of the State Government & the Department of Forests can not act in different manner as has rightly been observed interalia by the Department of Finance that '*so as to restrict financial liability, it cannot be used subvert/misinterpret any court order/judgment.'* Hence, the Department is advised to implement the court orders in its entirety. "

18. Law Department in the aforesaid communication specifically clarified that in cases of retrospective regularisation, especially on the basis of **Mool Raj Upadhyay**, ration of **Jai Dev**

Gupta, case cannot be imported. However, Forest Department, ignoring aforesaid clarification/information issued by the Finance Department and Law Department, proceeded to effect recovery of amount already sanctioned in favour of the petitioner on account of grant of work charge status.

19. During arguments, learned Additional Advocate General also placed reliance upon following judgments of Hon'ble Apex Court to substantiate the claim of the respondent Department that the petitioner is/was entitled for arrears for three year prior to filing of the petition:

1. Union of India & Ors. vs. Tarsem Sngh (2008) 8 SCC 648
2. Prahlad Raut v. All India Institute of Medical Sciences, Civil Appeal No. 6640 of 2019, decided on 27th August, 2019.
3. Prem Singh vs. State of Uttar Pradesh & Ors. (2019) 10 SCC 516
4. Harendra Chandra Nath vs. State of Tripura (Writ appeal No. 71 of 2007, decided on 30.5.2012) by Gauhati High Court.

20. However, having carefully perused aforesaid judgments rendered by Hon'ble Apex Court and other High Court(s), this Court finds that in all the aforesaid cases, though Hon'ble Apex Court held the claimants entitled for reliefs as prayed for but restricted payment of arrears for a period of three years having taken note of delay and laches in approaching court of law.

21. As has been discussed herein above, there cannot be any quarrel with the proposition of law that the Department/organisation liable to pay some amount can always pray to restrict the claim for a period of three years on the ground of delay and laches while placing reliance upon aforesaid judgments as well as judgment rendered in **Jai Dev Gupta** but if no such restriction is imposed by court, while holding a person entitled for some amount, Department/Organisation liable to pay such amount, of its own, cannot restrict claim of the claimant on the basis of aforesaid judgmenst, rather, in that eventuality, Department/organisation is either to pay full amount or to file further appeal, if any, against the judgment rendered by the court, whereby it has held a claimant entitled for full amount.

22. In the case at hand, respondents, of their own, having found petitioner entitled for grant of work charge status, granted him this benefit with effect from 1.1.2002 vide communication dated 13.2.2010 and thereafter, after having received clarification of Finance Department, calculated arrears to the tune of Rs.3,39,007/- and, as such, amount already ordered to be released in favour of the petitioner, cannot be recovered by the Department, that too by misinterpreting the judgment rendered by Hon'ble Apex Court in **Jai Dev Gupta**'s case.

23. Consequently, in view of above, present petition is allowed. Respondents are directed to release the entire amount of arrears as calculated /mentioned in Annexure R-3, dated 22.2.2012, within a period of three months, alongwith upto-date interest. Amount, if any

recovered from the petitioner shall also be paid to him, with upto-date interest, within above period.

All pending applications also stand disposed of.

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

Bal Mukund Kashyap ....Petitioner.

versus

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

CWP No. 1735 of 2016
Reserved on 25.9.2020
Date of decision: 30th September, 2020

Constitution of India, 1950-Article 226- Ground floor raised by the petitioner in the year 1990- Three storied building raised on its back side in 2009- Electricity connection already issued in ground floor in 1997- Area not within the domain of Town or Country Planning at the time of raising construction --- of petitioner that Electricity connection for new construction wrongly denied for want of additional storey, beyond three stories from competent authority- Held, that writ jurisdiction can be exercised for gross branches despite of remedy available to the petitioner to approach National Consumer Dispute Redressal forum against lower verdicts- Respondents failed to contend vis-a-vis complete prohibition against raising of a four storeyed construction in relevant area- Respondent fail to establish that relevant area falls within boundary of Town and Country Planning- Gross misapplication of notification dated 30.5.2012, which is not attracted- Petition allowed- Respondents directed to purvey the desired electricity connection to the petitioner's building. (Paras 5, 6)

For the petitioner: Mr. Subhash Mohan Snehi, Advocate.

For the respondent: Mr. Hemant Vaid Alld. A.G. with Mr. J. S. Guleria & Mr. Vikrant Chandel, DAG.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.

The writ petitioner, on affidavit, has averred that, upon, the land owned, and, possessed by him, he, in the year 2009, hence, raised a three storied building, rather on the backside of the earlier constructed ground floor. Earlier to the three storied construction, being raised in the year 2009, by the writ petitioner, the petitioner had raised a ground floor, in the year 1990, and, an electricity connection qua therewith, became purveyed to him, in the year 1997. The newly raised three storied building, in the year 2009, as aforestated became raised, on the backside of the earlier thereto, construction of a ground floor, and, also it is averred that, the area whereons, it becomes raised, rather was not thereat, within the

domain(s), of, the Town & Country Planing area, nor, hence any apposite approval(s), from, the competent authority, for, raising construction thereat, was required.

2. The respondents in their reply, meted to the writ petition, omitted to firmly contest, the afore averments, as, reared by the writ petitioner in his writ petition, (i) inasmuch as, appertaining to the apposite construction, being raised in the year 2009, and, thereat there being no necessity, under law, for, the meteing, of, approval(s), to the apposite building plans, rather by the competent authority. Contrarily, the respondents in their reply, merely make, a, contention, qua, under the relevant notification, issued on 30.5.2012, it becoming contemplated, qua there being no necessity, for, approvals, being meted by the competent authority, vis-a-vis, three stories, (ii) whereas, the petitioner raising four stories, hence, he became enjoined to, under law, obtain approval(s) for the additional storey, rather beyond three stories from the competent authority, (iii) and, since he omitted to purvey the afore approval(s), thereupon the electricity connection required thereto, being not amenable to be provided to him.

4. Tritely, hence with the respondents, omitting to forthrightly, deny the afore averments, vis-a-vis, in the year 2009, the petitioner on the backside of the earlier thereto, raised ground floor, in the year 1990, raising, a, three storeyed building, (i) and, also with their failing to completely deny, the averments, borne, paras No. 2, and, 3, of, the writ petition, hence making vivid displays, vis-a-vis, there being no necessity, vis-a-vis, approvals, being meted, for raising, of, building(s) in the areas, concerned, from the competent authority. Contrarily, theirs bringing-forth, a notification of 2012, hence making exemption(s), for raising of building(s), only upto three storeys, the inference as, ensues, therefrom, is, the respondents admitting, vis-a-vis, in the year 1990, the petitioners, raising, a ground floor, (a) and, thereafter his, in the year 2009, raising on the backside of the afore groud floor, three stories, hence, theirs also acquiescing, vis-a-vis, the area wherewithin(s), the afore stories, became raised, by the petitioner, rather not occurring, within the afore notification, issued by the competent authority, hence making it incumbent upon the petitioner, to obtain approval(s), for, the building plans, hence, from the competent authority. The concomitant sequel, thereof, is, qua, vis-a-vis, the afore years, rather the constructions, raised by the petitioner not requiring any meteings, of, any sanction, from the competent authority.

5. Be that as it may, the respondents, contend that with the District Consumer Disputes Redressal Forum while dismissing complaint No. 380 of 2013, and, the petitioner's afore complaint, claiming similar hereat relief, (i) and, thereafter with the afore dismissal orders becoming affirmed, in an appeal, preferred thereagainst, before the learned H.P. State Consumer Disputes Redressal Commission, (ii) hence, the extant remedy, is not a befitting

remedy, (iii) rather the remedy available to the writ petitioner, is to cast a challenge upon the afore verdicts, rendered respectively, by the District Consumer Disputes Reddressal Forum, and, latter by the H.P. State Consumer Disputes Redressal Commission, through his making a motion, before the learned National Consumer Disputes Redressal Forum. However, the afore plea, as, raised by the respondents, before this Court, cannot be accepted, as, dehors, the, existence, of, the afore alternative remedy hence available to the petitioner, this Court, cannot be fettered from exercising its writ jurisdiction, upon, gross and unwarranted breaches, becoming noticeably visited, upon, apposite rules, (iv) rather enjoining, or not enjoining, the applicability(ies), of, the apposite notification, qua, the area, whereat the petitioner has raised the afore construction. Since, breaches of the afore rules, and, of the afore notification, upsurge (v) from the respondents failing to deny, and, fully contest the averred factum of the writ petitioner, raising in the year 2009, the apposite construction, (vi) and, from theirs failing to contend, vis-a-vis, their being thereupto, any completest prohibition, against, raising of a four storeyed construction, by the petitioner, in the relevant area. Moreover, upon, lack, of, the afore completest denial, vis-a-vis, the afore foremost, relevant fact hence becoming combined, with the respondents' failing to establish, and, also failing to deny qua whereat, the relevant area occurs, it also hence falling within, the, the boundaries/zone, of, the Town & Country Planning, as, declared under the relevant notification, (vii) thereupon, the afore failings, reinforce the afore conclusion qua there being a gross mis application, of, the apposite notification, vis-a-vis, the area whereat, the relevant construction happened, (viii) and, also when thereupon, the concurrent orders, earlier made by the afore judicial fora, do not, upon, their readings, make any unfoldment(s), vis-a-vis, theirs appreciating the afore factum, (ix) thereupon, an inevitable sequel, becomes spurred qua, dehors the availability of an alternative remedy, reiteratedly, this Court becoming constrained, to, exercise its writ jurisdiction, for, therefrom, its making a review, of the untenable denial, meted by the respondents, to the writ petitioner. More so, and, imperatively, with the denial occurring, upon, a fallacious application, of, the relevant notification, as, issued under the relevant law, vis-a-vis, the area whereat, the, construction occurred.

6. Consequently, there is merit in the writ petition and the same is allowed, and, the respondents, are, directed to, in accordance with law, purvey the desired electricity connection to the petitioner's building. All pending applications, if any, also stand disposed of

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

1. **CWP No. 2492 of 2017**

State of H.P. ....Petitioner.

versus

Dr. Sanjeev Mahajan ...Respondents.

2. **CWP No. 3471 of 2020**

Dr. Sanjeev Mahajan. ... Petitioner

versus

State of H.P. ...Respondent.

CWP No. 2492 of 2017 a/w
CWP No. 3471 of 2020
Reserved on 25.9.2020
Date of decision:30.09.2020

Constitution of India, 1950-Article 226- Order passed by Ld. erstwhile H .P State Administrative Tribunal in both the writs quashing termination of Dr. Sanjeev Mahajan directing State of H.P. to re-instate him in service from 8/5/2006- Challenged- Held, that services of Dr. Sanjeev Mahajan governed by CCS & CCA Rules- Incumbent upon respondent to hold an inquiry for alleged commission of purported misconduct or even heinous crime- Criminal Court exonerated Dr. Sanjeev Mahajan from charges- CWP filed by State of H.P. dismissed whereas CWP No. 3471 of 2020 filed by Dr. Sanjeev Mahajan allowed- Sentence occuring in Paragraph w- 9 in order of erstwhile H.P. State Administrative Tribunal quashed. (Paras 3, 4 & 5)

For the petitioner: Mr. Ajay Vaidya, Sr. Addl. A.G. with Mr. Hemant Vaid and Himanshu Mishra, Addl. A.Gs. & Mr. J. S. Guleria & Mr. Vikrant Chandel, DAGs and for respondent in CWP No. 3471 of 2020

For the respondent: Rajiv Jiwan, Sr. Advocate with Mr. Ajit Sharma, Advocate for the petitioner in CWP No. 3471 of 2020 and for the respondent in CWP No. 2492 of 2017.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.

Since, both writ petitions, respectively bearing CWP No. 2492 of 2017, and, CWP No. 3471 of 2020, are, directed against the orders, made by the learned erstwhile H.P. State Administrative Tribunal, upon, TA No. 4631 of 2015, (i) wherethrough, the impugned thereat orders of termination, made, upon, one Dr. Sanjeev Mahajan, and, as embodied in Annexure P-11, became quashed, and, set aside, and, a direction was meted, upon, the respondent, to reinstate the afore in service, from 8.5.2006, hence both are amenable for a common verdict, becoming recorded thereon.

2. The challenge, made, by the State of Himachal Pradesh, vis-a-vis, the afore made orders, by the learned erstwhile H.P. State Administrative Tribunal, is, grooved (a) in the factum, vis-a-vis, there being a complete failure of the learned erstwhile H.P. State Administrative Tribunal, in, not appreciating, vis-a-vis, hence valid retrospective effect(s) being amenable, to, be assigned, to,orders of termination, made upon him, by the respondent, as, it become founded, upon, his indulging in a heinous crime, (b) and, per-se thereupon there is no necessity, for, theirs adhering to the relevant provisions, borne in the CCS & CCA Rules, (c) hence rather enjoining the conducting, of, an inquiry, appertaining to the apposite misconduct rather prior thereto. On the other hand, the writ petitioner in CWP No. 3471 of 2020, one Dr. Sanjeev Mahajan, seeks expurgation of the last line, in the sentence, occurring in paragraph-9, of the orders, rendered on 4.5.2017, upon, TA No. 4631 of 2015, by the learned erstwhile H.P. State Administrative Tribunal, wherein a perennial power becomes vested in the respondent, to, dehors Annexure P-11, becoming quashed, and, set aside, theirs hence holding leverage to proceed, in accordance with law, against, the applicant.

3. Mr. Ajay Vaidya, the learned Senior Advocate General appearing for the State, on the afore ground contends, that, the impugned order hence warrants interference. However, his afore made espousal is lacking in legal vigour, and, also consequently becomes rudderless, in the face of the appointment letter, issued to the respondent Sanjeev Majahan, apparently displaying, vis-a-vis, his service being governed by the relevant CCS & CCA Rules, (i) and, thereupon, even, if at the relevant time, Dr. Sanjeev Majahan did allegedly commit any heinous crime, (ii) yet alleged commission thereof, did encumber, upon, the respondent/disciplinary authority, to prior to its, his proceeding to terminate him from service, hence hold an inquiry, vis-a-vis, any purported misconduct, becoming committed by him, during the phase, of, his serving the respondent. Obviously, with the afore statutory mandate, becoming breached, and, rather the respondent revoking the suspension, of, the respondent, thereupon the afore made submission, does not carry any legal weight, and, reiteratedly, is, straightway rejected.

4. Further strengthened reason(s), for, making the afore conclusion, become spurred from the respondent, in their reply to the afore transferee petition, acquiescing therein, the factum of the afore Dr. Sanjeev Mahajan, becoming completely exonerated, from, the apposite charges, becoming drawn against him, through a verdict, made by the criminal court of competent jurisdiction, (a) and, since the verdict made by the criminal court, has not been demonstrated, to, become set aside, by the appellate Court, (b) thereupon, it holds binding, and, conclusive force, and, therethrough, the purported guilt attracted, vis-a-vis, the petitioner, Sanjeev Mahajan, and, arising from his reiteratedly, committing a heinous crime, become(s) throughly effaced, (c) nor hence the respondents contention that, yet, any absolute right

inheres, in the respondent, to, hold any domestic inquiry, against the petitioner Dr. Sanjeev Majahan, vis-a-vis, the afore predominant factum, holds any vigour (d) nor also the afore last sentence occurring in paragraph-9, of, the impugned order, as, made by the learned erstwhile H.P. State Administrative Tribunal, can assume any aura of validity. Conspicuously also when, unless the afore direction, is, made, thereupon, the very edifice, of, service jurisprudence enshrining, the, twin principle(s) (a) there being an enlivened cause of action, (b) the conduct, of, a domestic inquiry being in contemporaneity with, the holding, of, the apposite trial, by a criminal court, hence, in accordance with law, would rather, become an inapt casuality. Significantly, also when, the, relevant cause, of, action has become deadened, hence, for the afore reason.

5. Consequently, CWP No. 3471 of 2020 is allowed to the extent that the last sentence, occurring in paragraph-9, becoming quashed and set aside. However, CWP No. 2492 of 2017, preferred by the State of H.P., is dismissed, and, the order of 4.5.2017, made by learned erstwhile H.P. State Administrative Tribunal, is, modified to the above extent. All pending applications, if any, also stand disposed of.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Dr. Rajesh Singh. ... Petitioner

versus

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

CWP No. 2659 of 2020
Reserved on 25.9.2020
Date of decision: 30.09.2020

Constitution of India, 1950- Article 226- Petition transferred and posted as Deputy Director (Animal Husbandry and Breeding) to District Kinnuar- Challenged- Held, that petition has less than five years to superannuate- Execute ousted to exercise power to request the petitioner in tribal area on promotion- Clause 1201 of relevant policy subject to exception- Even respondent No.3 accorded willingness to be posted in place of petitioner- Transfer taking place in the relevant banned phase without necessity- Petition allowed – Impugned order quashed and set aside- Respondents directed to corridor co-respondent No.3 to be posted as Deputy Director, Animal Health/ Breeding Kinnaur in place of Petitioner. (Paras 4, 5)

For the petitioner: Mr. R. K. Gautam, Sr. Advocate with Mr. Gaurav Gautam, Advocate.

For the respondents: Mr. Hemant Viad, Addl. A.G. with Mr. J. S. Guleria and Mr. Vikrant Chandel, DAGs, for respondents No. 1 and 2.

Mr. Ankush Dass Sood, Sr. Advocate with Ms. Shweta Joolka, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The petitioner, upon, his promotion from the hitherto post, as, Assistant Director, become transferred, and, posted as Deputy Director (Animal Husbandry & Breading), to, District Kinnaur. The afore orders, of, posting, of, the petitioner, upon,his promotion, to the afore post, has been challenged, through the extant writ petition.

2. The challenge, to, the transfer order, is, grooved in the impugned transfer order, borne in Annexure P-1, infringing the conditions, embodied in the apposite instructions, of, 20.7.2020, hence, mandating against postings, and transfers being made within the phase(s) or period(s), as, embodied therein. Furthermore, it is also averred that the petitioner, is, beset with disturbing circumstances, inasmuch as, his becoming enjoined to lookafter his father, aged 87 years, and, also his posting at a remote/hard/difficult area, from his present place of posting, especially at the fag end, of, the petitioner's career, making breaches, upon, the relevant principles, borne in Annexure R-1, (a) principles whereof, regulate the transfer, of, State Government Employees, inasmuch as, it becoming embodied therein, vis-a-vis, (b) there being no embargo, upon, the government to dehors the public officer earlier serving in difficult/ hard/tribal area, to, on his promotion, hence, re-transfer, and, re-post him thereat, (c) yet with a rider when he has less than five years for superannuation. The afore apposite exceptions, vis-a-vis, the afore plenitude powers, of, transfer, conferred, upon, the respondents, rather arising hereat. Significantly, since the petitioner has averred, on affidavit, vis-a-vis, his falling within the zone, of, the afore exception, to the afore powers, vested in the government, inasmuch as, his being aged 55 years, reiteratedly, thereupon the apposite exemption, becoming applicable to him.

3. On the other hand, co-respondent No.3, upon his promotion has been directed to join at the extant station, of, the petitioner. The respondents, meted a detailed reply to the writ petition, and, contested the endeavour, made by respondent No.3, to his becoming posted at Kinnaur, in substitution, to, the posting thereto, of, the petitioner, (i) on the ground, vis-a-vis, respondent No.3, holding vested interests in commercial properties, owned by him thereat, inasmuch, as, in District Kinnaur. Furthermore, it is also contended in the reply, furnished, to, the writ petition, vis-a-vis, there being a contemplation in the relevant policy, against officers

being posted, in their respective home districts, or, divisions. Consequently, it becomes incumbent, upon, this Court to test the validity, of, the afore propagation, made, by the learned counsel for the writ petitioner, and, by the counsel for respondent No.3, along with, other contentions, made before this Court, in the reply furnished thereto, by the respondents. The fulcrum of the entire lis becomes rested, upon, Annexure R-1, annexure whereof, contemplates therewithin, the guidelines, regulating the transfer, of, State employees. A reading thereof unfolds, vis-a-vis, the Annexure R-1, becoming applicable, vis-a-vis, all officers/ officials, working in the Government of Himachal Pradesh, and, also it becoming applicable, to, officials/officers, of, the Boards/Corporations, and, Autonomous Bodies, under the State Government, (i) besides it is made applicable, to, the teachers, in, the Education Department. In trite, though there is a complete bar(s) against transfers, of, the officers/officials, as, enumerated therein, or, vis-a-vis, theirs being posted, at the places, mentioned therein, (ii) however, the public office of Assistant Director, or, Deputy Director, is not occurring therein. Consequently, it is un-befitting for the respondents, to contend in their reply, that it is not open to the petitioner, or, to respondent No.3, to contend qua theirs being continued to become posted, within their home districts, or, in proximity thereof, (iii) nor also it is open to the respondents to contend especially, vis-a-vis, respondent No. 3, qua given, his owning commercial properties, within District Kinnaur, (iv) thereupon, upon, his becoming posted thereat, rather would neutralise, his impartiality, and, transperancy, besides, public interest would become jeoparadised, as, no cogent material, in support thereof, becomes placed on record. Needless to say, that unless, the respondents had placed on record, cogent material, displaying, vis-a-vis, theirs meteing stringent adherence, to the afore, material whereof, is, amiss, (v) thereupon it is open to the respondents, to frustrate the impugned annexure, as, endeavoured by the writ petitioner, through the instant writ petition, nor it is open for the respondents, to despite respondent No.3, willing, to, become substituted at the place of posting, of, the writ petitioner, rather baulk his endeavour merely on the afore untenable grounds, as, thereupon this Court would wreak unreasonable discrimination, upon, the petitioner, and, also upon respondent No.3.

4. Be that as it may, even though, a reading of Clause 12, of the relevant policy, clause 12.1 whereof, is, extracted hereinafter:-

> "12.1 All the Departments will ensure that all employees during their entire period of service will serve for at least single tenure in the Tribal/ Difficult/Hard areas and remote/rural areas. In order to earn their promotion, service in such areas will be mandatory. This would be subject ot adequate number of posts being available in such areas. However, this will not apply to those employees who have less than 5 (five) years to superannuate. This stipulation is to be incorporated in R & P Rules wherever applicable. A common provision to this

effect has been devised by the Department of Personnel after having obtained the approval of competent authority. No Government employee can claim his transfer or posting as a matter of right. It will be the discretion of the State Government to post/transfer any employee anywhere in the State keeping in view of the administrative exigencies/convenience."

leverage powers in the respondents, to dehors their earlier serving in hard/difficult/tribal areas, yet, upon, their apposite promotion(s) occurring, to re-post any public officer rather thereat, (a) and, also though service in the afore hard area, on promotion, taking place, is, a mandatory condition. However, the afore mandate, borne in clause 12.1, of, the policy, occurring in Annexure R-1, hence in relaxation of all the earlier thereto, cast enunciations, rather empowering , the, executive to, on occurrence, of, promotion, re-post any public officer, in hard/difficult/tribal area, is yet with an exception, (b) inasmuch as, upon, employees holding less than five years to superannuate, (c) thereupon the executive becoming ousted to exercise, the powers, to, upon, promotion(s), of, the public officer, hence, of, reposting him thereat. Since the petitioner has uncontrovertedly averred on affidavit, that he has less than five years to superannuate, thereupon, the afore exemption, to the afore leverage, as, meted to the executive, rather empowers him, to efficaciously contest the validity, of, the impugned transfer order, moreso when respondent No.3, has accorded, his willingness to become substituted, against the station, whereat the writ petitioner, is posted, hence under the impugned order.

5. Significantly, also the respondents, did not deny, qua the transfer(s), taking place in the relevant banned phase, and, also they did not place, on record, the imperative necessity, of, an order of transfer, upon, happening, during the afore ban, it evidently validly happening, with the prior approval of Hon'ble the Chief Minister. Consequence thereof is, the impugned order is quashed and set aside. Furthermore, also the respondents are directed to hence, as desired by co-respondent No.3, to, in the interest of public administration, consider to post him, in substitution of the writ petitioner, to, the office, of, Deputy Director Animal Health/Breeding, Kinnaur. All pending applications, if any, also stand disposed of.

BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Kubja Devi

....Petitioner

Versus

Chhape Ram

.....Respondent

CMPMO No.542 of 2018
Reserved on: 28.09, 2020
Decided on: 05.10.2020

Constitution of India, 1950- Article 227, Code of Civil Procedure, order 39 Rules 1 & 2- Plaintiff- Wife claiming suit land to be ancestral property owned and possessed by defendant-Humble, filed suit for declaration and permanent injunction- Claim for charge to be created over suit land for maintenance- Application for interim injunction to restrain the defendant from alienating, transferring, certify charge over suit land dismissed by courts below – Challenged- Held, that no order awarding maintenance placed on record- Charge as yet not created over suit land towards maintenance of the plaintiff- Plaintiff has right to take recourse to legal remedies in case of alliterative of ancestral property by Kartar without legal necessity- No interference called for in the concurrent orders passed by Ld. Court below- Petition dismissed. (Para 5)

Cases referred:
Sunil Kumar and another Versus Ram Prakash and others, 1988 (2) SCC 77;
V.Tulasamma and others Versus Sesha Reddy (dead) by LRs (1997) 3 Supreme Court Cases 99;

For the petitioner: Mr. Anup Rattan, Advocate.

For the respondent: Mr. Maan Singh, Advocate.

(**Through Video Conferencing**)

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

Application moved under Order 39, Rules 1 and 2 of the Code of Civil Procedure (CPC) for restraining the defendant from alienating, transferring and for creating charge over the suit land, has been dismissed by the learned trial Court. The order has been upheld by the learned Appellate Court. Being aggrieved, petitioner-plaintiff has moved this petition under Article 227 of the Constitution of India.

2. Facts.

2(i). Suit was instituted by the plaintiff-wife seeking declaration that suit land is ancestral property owned and possessed by the defendant-husband and charge be created over this property for the maintenance claim of the plaintiff. Decree for permanent prohibitory injunction was also prayed for restraining the defendant from transferring, alienating and creating charge over the suit land.

2(ii). Plaintiff claimed to be the legally wedded wife of the defendant, having solemnized a marriage with him in the year 1994. The couple has a son stated to be living with the plaintiff. Due to marital discord, plaintiff started residing with her father since the year 1998. It has been further submitted that an application for grant of maintenance etc. has been moved by the plaintiff under Section 12 of the Protection of Women from Domestic Violence Act, 2005, which was stated to be pending consideration before the Court of learned Judicial

Magistrate 1st Class, Manali. Apprehending that in order to defeat her maintenance claim, the defendant might sell the suit land in favour of other persons, instant suit for declaration and injunction has been filed. In the plaint, it has been asserted that the suit land is ancestral property owned and possessed by the defendant, who has no right to alienate the same without there being any legal necessity.

Alongwith the plaint, an application under Order 39, Rules 1 and 2, CPC has also been moved for restraining the defendant from alienating, transferring and creating charge over the suit land.

2(iii). The defendant, in his written statement, admitted the plaintiff to be his legally wedded wife and asserted that she had left his society on her own about 17-18 years ago without any reason. The defendant expressed his willingness to accept the plaintiff back in his home. Allegations of cruelty/desertion were denied. Defendant admitted filing of an application by the plaintiff under Section 12 of the Protection of Women from Domestic Violence Act, 2005, but denied award of any maintenance amount to her. Defendant also denied threatening the plaintiff with sale of suit land, rather he stated that he had himself asked his son to cultivate and manage the suit land. Defendant also denied ancestral nature of the suit land. Plaintiff's application for injunction was also opposed on similar lines.

3. Learned trial Court after noticing that as per plaintiff, the suit land was ancestral, relied upon ***1988 (2) SCC 77***, titled ***Sunil Kumar and another Versus Ram Prakash and others***, wherein it was held that a coparcener has no right to get an injunction against *Karta*. Relying upon this judgment, it was held that in the instant case, defendant was *Karta*, therefore, he has legal right to alienate ancestral property in case of legal necessity. Plaintiff has no right to pray for injunction restraining the defendant from alienating the suit land. It was observed that plaintiff has remedy of challenging alienation of coparcenery property by *Karta* on the ground that alienation was not for legal necessity. The order passed by learned trial Court dismissing plaintiff's application, was affirmed in appeal by the learned First Appellate Court.

4. Learned counsel for the petitioner contended that both the learned Courts below misdirected themselves in treating the civil suit as one filed by a coparcener to restrain and injunct *Karta* from alienating the suit land, whereas the civil suit was a case instituted by the wife for creation of charge over the property of her husband in lieu of maintenance and, therefore, permanent prohibitory injunction for restraining the defendant was also sought for. In support of this contention, reliance was placed upon the following para of ***(1997) 3 Supreme Court Cases 99***, titled ***V.Tulasamma and others Versus Sesha Reddy (dead) by LRs***:-

> *"62. We would now like to summarise the legal conclusions which we have reached after an exhaustive considerations of the authorities mentioned*

above on the question of law involved in this appeal as to the interpretation of Section 14(1) and (2) of the Act of 1956. These conclusions may be stated thus:

> *(1) The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognized and enjoined by pure Shastric Hindu law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognizing such a right so that any transfer declaring or recognizing such a right does not confer any new title but merely endorses or confirms the pre-existing rights……."*

Whereas learned counsel for the defendant on the strength of ***(1998) 2 SCC 77, Sunil Kumar and another Versus Ram Prakash and others,*** argued that plaintiff cannot seek injunction against *Karta* with respect to ancestral property.

5. V. Tulasamma's (supra) was a case where properties were acquired by the appellant under a compromise in satisfaction of her right of maintenance. It was held that it is Sub-section (1) and not Sub-section (2) of Section 14, which would be applicable and, hence, the appellant must be deemed to have become full owner of the properties notwithstanding that the compromise prescribed a limited interest for her in the properties.

Regarding maintenance claim of wife viz-a-viz creation of charge over husband's property, it will be appropriate to refer here to following paras from a judgment of Madras High Court in ***Kannan Vs. Maragathammal, Second Appeal No.654 of 2003***, decided on 28.06.2003, 2012 (3) LW 632:-

> *70.Added further, this Court quotes the decision Chandramma v. Maniam Venkatareddi and others AIR 1958 Andhra Pradesh at p.396, wherein it is held as follows:-*
>
> *The Hindu Law Texts and the important commentaries impose a legal personal obligation on a husband to maintain his wife irrespective of his possession of any property, whether joint or self- acquired. They recognise the subordinate interest of the wife in her husband's property arising out of her married status. They also prohibit the alienation of properties by the*

husband which has the effect of depriving her and other dependants of their maintenance. They further treat her as a member of a Hindu joint family entitled to be maintained out of joint funds. The decisions of the various High Courts tow the same line, recognise her subordinate interest in her husband's property and enforce his personal obligation by creating a charge on his properties either self-acquired or ancestral. A wife, therefore is entitled to be maintained out of the profits of her husband's property and, if so, under the express terms of S.39 she can enforce her right against the properties in the hands of the alienee with notice of her claim. AIR 1947 Mad. 376, Dissented from. AIR 1957 Andh.Pra. 710. Approved. Case law discussed. (Para 39)

71.In Banda Manikyam v. Banda Venkayamma and others AIR 1957 Andh. Pra. at p.710 it is held as follows:-

The Hindu Married Women's Right to Separate Residence and Maintenance Act is intended to enlarge and liberalise the rules of Hindu Law governing the rights of a Hindu Woman to maintenance from her husband in the contingencies therein specified. The Act does not curtail or cut down the right of maintenance conferred either by the Hindu Law or by S.39 of the Transfer of Property Act. It does not affect the right of a wife to have payment of her separate maintenance secured by a charge on her husband's properties in his hands or in the hands of his gratuitous transferee if, under any other law, she has such a right. (para 3) Though the right of the wife to separate maintenance does not form a charge upon her husband's property, ancestral or self-acquired, yet, when it becomes necessary to enforce or preserve such a right effectively, it can be made a specific charge on a reasonable portion of the property. If the right of maintenance is imperiled or jeopardised by the conduct and dealings of the husband or father with reference to his properties, the Court can create a charge on a suitable portion thereof, securing the payment of maintenance to the wife or children. Such a charge can be created not only over the properties in the hands of the husband or father but also over properties transferred by him either gratuitously or to persons having notice of the right to maintenance.

A transferee (in this case, the mother) who joins in a fraudulent and clandestine arrangement for defeating the right of maintenance binding on the conscience of the transferor and who pays no consideration for the transfer by her son in her favour, takes the properties subject to that right. The property in her hands is legally chargeable with the payment of maintenance to the wife and children of the transferor under S.39 of the Transfer of Property Act. Case Law Re: AIR 1947 Mad. 376 Dissent from (para 14)."

At present, only the application under Order 39, Rules 1 & 2, CPC seeking injunction against the defendant for restraining him from alienating the suit land, has been adjudicated upon. In the instant case, plaintiff is living separately from her husband since the year 1998. She has moved an application for grant of maintenance under the Protection of

Women from Domestic Violence Act, 2005. No such order awarding any maintenance under the Act has been placed on record of the case. Act of 2005 also contains adequate safeguards for enforcement of the orders awarding maintenance amount. Plaintiff has herself pleaded that defendant being *Karta* of the family, has right to alienate the suit land in case of legal necessity. Nature of suit land as per plaintiff is 'ancestral property'. Her son is not a party to the civil suit instituted by her in 2017 seeking creation of charge over the suit land and for injuncting the defendant (*Karta*) from alienating the suit land alleged by her to be ancestral property. Charge as yet has not been created over the suit land towards maintenance of the plaintiff. Plaintiff has every right to take recourse to legal remedies in case of alienation of ancestral property by *Karta*, which is not out of legal necessity.

For the forgoing reasons, no interference is called for in the concurrent orders passed by the learned Courts below in dismissing the application moved by the petitioner-plaintiff seeking to restrain the respondent-defendant from alienating the suit land. The petition, therefore, being devoid of merits, is dismissed. It is, however, clarified that the above observations are only for the adjudication of instant petition and shall have no bearing on the merits of the main case. Parties through their respective counsel are directed to appear before the learned trial Court on 27.10.2020. Records of the learned Courts below be returned forthwith. Pending miscellaneous application(s), if any, also stands disposed of.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, JUDGE

Himani Verma and others ...Petitioners

Versus

Himachal Pradesh University ...Respondent

CWP No. 4095 of 2020
Reserved on : 05.10.2020
Date of decision: 06.10.2020

Constitution of India, 1950-Article- Petitioners appeared in the first semester examinations held in January- February 2020, the result of which was not announced- Examination of second Semester not held in time by University- Petitioner seeking quashing of date sheet issued on 18.9.2020 for conducting B.ed second semester examination and direction to respondent university to declare the result of first semester of B.ed promote petitioners to third semester without conducting examination of second semester- Held, that UGC has not restricted that right of respondent university to hold semester examination beyond 30.9.2020- Restriction imposed due to lockdown on account of Covid-19 Pandemic gradually lifted and

examination can be held by observing standard operating procedure issued by government- Respondent university submitted that result of second semester will have no impact on the admission of petitioner to third semester- Petitioner can not be promoted to next semester without conducting examination of B.ed second semester- Entire process of hold examination cant be halted- Petition dismissed. (Para 5)

Cases referred:

Vasireddy Govardhana SaiPrakash and others Vs. Union Public Service Commission and others W.P. (C) No. 1012/2020;

Sayantan Biswas and others Vs. National Testing Agency (NTA) and others, W.P. (C) No. 812/2020;

For the Petitioners: Mr. J.L. Bhardwaj, Advocate .

For the Respondents: Mr. Neel Kamal Sharma, Advocate

The following judgment of the Court was delivered:

Jyotsna Rewal Dua,J.

Six students pursuing Bachelor of Education (in short B.Ed.) in Himachal College of Education, Nalagarh, District Solan, H.P. have preferred instant writ petition primarily seeking quashing of date-sheet issued by the respondent-University for conducting B.Ed. second semester examinations scheduled from 07.10.2020. The petitioners have further prayed for directing the respondent to promote them and all other students of B.Ed. second semester to the third semester without conducting second semester examinations.

2. Petitioners were admitted in B.Ed. for the session 2019-2021. The B.Ed. is a professional course of two years' duration comprising four semesters. Petitioners appeared in the first semester examinations held in January-February, 2020, the result of which is yet to be announced.

The petitioners are now in the second semester. The examinations for the second semester were not held in time by the University. Vide Annexure P-3, a date-sheet for holding B.Ed. second and fourth semester examinations for regular college w.e.f. 07.10.2020 has been announced. Feeling aggrieved against scheduling of second semester examinations, six students have moved this Court praying for following reliefs :-

> "*(i) That a writ in the nature of certiorari may kindly be issued to quash the date-sheet issued on 18.09.2020 by the respondent-University for conducting the B.Ed. second semester examination only ;*
>
> *(ii) That a writ in the nature of mandamus may kindly be issued directing the respondent-University to declare the result of the first semester examination of B.Ed. for the sessions 2019-20 and to promote the petitioners and other students to third semester without conducting the examination of second semester as has been done by the Central University, Himachal Pradesh, Delhi University, Punjab Engineering Colleges etc. and justice be done."*

3. In support of the reliefs claim in the writ petition, learned counsel for the petitioners argued that (i) the University Grants Commission (in short UGC) has issued instructions dated 06/08.07.2020 to conduct terminal semester/final year examinations by 30.09.2020. In the instant case, the respondent-University did not conduct examination of final year/terminal semesters by 30.09.2020. The respondent-University now cannot hold second and fourth semesters' examinations w.e.f. 07.10.2020 ; (ii) due to COVID-19 Pandemic, various exams in the respondent-University were delayed or not conducted. The situation, so arisen, has not improved. Considering the health and safety of the students, the exams of second and fourth semesters of B.Ed. should not be held ; (iii) on the analogy of Central University, H.P., Delhi University, Punjab Engineering College, the petitioners and all other students of B.Ed. second semester should be directly promoted to the third semester without holding the second semester examinations ; (iv) holding the semester examinations as per the date sheet would mean utilization of at least one month (October, 2020) for the conduct of examinations. The petitioners, as of now, have not studied for the third semester, therefore, it is desirable they be promoted to the third semester without wasting any further time and third semester classes should be started immediately.

4. On the strength of the reply filed by the University, learned counsel for the respondent submitted that :- (i) for professional courses, guidelines of their respective Regulatory Bodies are being followed by the University. The Regulatory Body for holding the educational courses is National Council for Teachers Education (for short NCTE). No restriction has been imposed by the NCTE for not holding the semester-wise B.Ed. examination ; (ii) B.Ed. being a professional course, the students cannot be promoted from one semester to another without giving the examinations. Students who have appeared in the first semester examinations are allowed to take admissions in second semester. In case of their getting 're-appears' in any course of first semester, they are required to appear in such examinations as and when the exams are scheduled for the first semester; (iii) NCTE has not made any recommendations for promoting the students from one semester to another without holding the examination. Respondent, being a State University, is also following State Government instructions for holding the examinations, mode of examinations etc. State has not taken any decision for promoting the students without taking the examinations ; (iv) in any case, the result of second semester will have no impact on the admission of students to the third semester. The plea of petitioners for promotion to next semester without holding second semester examinations for a professional course is not justified as the students after giving the second semester examinations can take admission in the third semester ; (v) the examinations for first and third semesters are usually held in November/December, whereas for second and

fourth semesters, these are generally held in June/July. The examinations of B.Ed. first and third semesters for this session were held in February 2020 on account of late admissions. Due to COVID-19 Pandemic, the evaluation of answer scripts has been delayed. However, the process of declaration of the result is under progress and the result of first semester examinations shall be declared shortly. However, result of first semester has no relevance to the conduct of second semester examinations as the students who have appeared in first semester examinations are admitted to the second semester. ; (vi) The B.Ed. second/fourth semester examinations are scheduled to be held after post graduation examinations. Because of COVID-19 Pandemic situation, the post graduation examinations were also delayed. The date-sheet for holding the B.Ed. examinations has been issued and exams are scheduled to be held alongwith termination of most of post graduation examinations ; (vii) the B.Ed. examinations are scheduled to be held by the respondent-University in 57 examination Centres across the State. The exams will be held strictly in accordance with instructions and the Standard Operating Procedure issued by the Ministry of Human Resources Development, Department of Higher Education vide memorandum dated 06.07.2020 for the conduct of the examinations as adopted by the Government of Himachal Pradesh as well as by the respondent-University.

5. Having heard learned counsel for the parties, we may observe that the UGC has not restricted the right of the respondent-University to hold semester examinations beyond 30.09.2020. The instructions of UGC dated 06/08.07.2020 relied upon by learned counsel for the petitioner were issued as per the situation and circumstances prevailing at the relevant time. The restrictions imposed due to lock-down on account of COVID-19 Pandemic have been lifted gradually and now the Nation is in Unlock-5 stage, where almost all the restrictions have been eased out/lifted. There is no dispute that the NCTE i.e. the Regulatory Body for the course in question has not issued any restriction for holding the B.Ed. semester examinations.

Hon'ble Apex Court in **Vasireddy Govardhana SaiPrakash and others** Vs. **Union Public Service Commission and others W.P. (C) No. 1012/2020**, decided on 30.09.2020 dismissed the plea seeking postponement of UPSC examinations scheduled from 04.10.2020 in the wake of COVID-19 Pandemic. It was observed *that "in the recent past, various public examinations have been successfully conducted by different authorities. That is a testimony of the fact that if proper Standard Operating Procedures are observed by all concerned, as defined by the Ministry of Home Affairs, it is possible to conduct such examinations."* In the case of **Sayantan Biswas and others** Vs. **National Testing Agency (NTA) and others**, **W.P. (C) No. 812/2020**, decided on 17.08.2020, the Hon'ble Supreme Court while dismissing the writ petition seeking postponement of NEET/JEE exams, observed that *"there is no justification in the prayer made for postponement of the examinations in question relating to NEET UG-2020 as*

well as JEE (Main) April, 2020. In our opinion, though there is pandemic situation, but ultimately life has to go and the career of the students cannot be put on peril for long and full academic year cannot be wasted."

Prayer of the petitioner for directly promoting them to third semester cannot be allowed. The respondent-University has clearly submitted that the result of the second semester will have no impact on the admissions of the petitioners (students of B.Ed. second semester) to the third semester. However, they cannot be promoted to the next semester without conducting the examinations of B.Ed. second semester, a professional course. Because of unprecedented scenario, the schedule for holding the examinations as well as the teaching schedule has changed. Respondent-University has undertaken to start third semester classes after the semester examinations as and when the same is permitted by the State.

Regarding the prayer of the petitioners for declaring result of B.Ed. first semester examinations for the session 2019-20, suffice to note that respondent-University has already undertaken in its reply to declare the result of B.Ed. first semester examinations held in February, 2020 'shortly'. However, declaration of result of first semester examinations has no relevance viz-a-viz holding of second semester examinations.

We may also take note of the fact highlighted by the respondent-University that by not holding the scheduled examination of the second semester, the students who are appearing in final/fourth semester and have re-appears in second semester examination, will be put to great disadvantage as in that eventuality, they will not be able to clear their reappears before June/July, 2021 and will have to wait for full one year for completion of their degree.

Respondent University is conducting B.Ed. examinations w.e.f. 07.10.2020 for 7624 students of second semester and 7254 students of fourth semester across 57 examination Centres. The entire process cannot be halted on account of misconceived notions cultivated by six students. In view of reply filed by the University, we have no reason to doubt that examinations shall not be held in accordance with Standard Operating Procedure issued in this behalf by Competent Authorities from time to time.

For the foregoing reasons, we find no merit in this writ petition and the same is accordingly dismissed. Pending applications, if any, also stand disposed of.

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

Uma Kanwar .....Petitioner

Versus

State of HP and Ors. .....Respondents

CWPOA No. 1422 of 2020

Decided on: 29.9.2020

Constitution of India, 1950-Article 226- Petitioner worked as Clerk on muster roll daily wage basis on compassionate ground on after after dealt of her /husband respondent- Corporation- Later, joined as Clerk in respondent No.2 department and permanently absorbed there- Prayer to include the duration of period rendered by her husband in the respondents corporation in her service length for seniority pension or other benefits- Held, that there is /are no law/ instructions which provide for counting of length of service of deceased employee for grant of service benefits etc to dependent appointed on compassionate grounds- Compassionate appointment offered to the dependent ---- be said to be continuation of service rather same is to be considered as a new appointment- Petition dismissed. (Paras 3, 4 & 5)

For the Petitioner	:	Mr. Subhash Sharma, Advocate.
For the Respondents	:	Mr. Ashok Sharma, Advocate General, with Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocates General, for the State. Mr. Naveen K. Bhardwaj, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Husband of the petitioner was engaged as plant attendant on daily wage basis on 23.2.1991 in the respondent corporation as can be inferred from communication dated 23.2.1991 (A-1). Since husband of the petitioner expired in harness on 6.9.1997, petitioner being her dependant filed an application dated 21.11.1997 to the respondent-corporation, praying therein to offer her appointment on compassionate grounds Pursuant to aforesaid request made by the petitioner, she was offered job of Clerk on daily wage/muster-roll basis for a period of 89 days and as such, continued till 4.11.2004, whereafter on the basis of the decision dated 30.9.2004, taken by the Board of Directors of the Corporation, petitioner was allowed consolidated salary of Basic Pay + DA of her respective grade i.e. Rs. 5120/- on compassionate grounds (A-3). In the year, 2007, respondent Labour department opened a new office of sub office employment exchange at Sujanpur, which provided the opportunity to the petitioner to join as Clerk in the said exchange on the secondment basis. Consequent upon approval of the respondent Government for permanent absorption of the employee of respondent No.3-corpporation against the vacant post of clerk, applicant was ordered to be absorbed in respondent No. 2-department with immediate effect in the pay scale of Rs. 5910-20200+1900 GP as is evident from order dated 2.12.2011 (Annexure A-6). Since her absorption, petitioner has been working continuously with respondent department till date. By way of instant petition, prayer has been made on behalf of the petitioner to issue direction to

respondent No.2-corporation to include the duration of period rendered by her husband in the respondent corporation in her service length for the purpose of seniority, pension and other benefits. In the aforesaid background, petitioner approached the Erstwhile HP State Administrative Tribunal by way of original application, which after abolishment of the same, now stands transferred to this Court for adjudication, praying therein for following main reliefs:-

> (i) That the respondent Corporation may kindly be directed to notionally regularize the service of the applicant as a Clerk upon the completion of 8 years of purported services of her husband in the year 1999 and further also a direction be given to the respondent Corporation to grant the seniority and promotional benefits till 2007 when she joined the respondent department on secondment basis.
>
> (ii) That after the respondent Corporation does the needful, consequently, the respondent department may kindly be directed to grant the seniority and promotional benefits to the applicant in sequel thereto.

2. Having heard learned counsel for the parties and perused pleadings adduced on record by the respective parties, this Court finds no merit in the petition and same deserves outright rejection. It is not in dispute inter-se parties that petitioner came to be appointed as clerk on daily wage basis in the respondent–corporation on compassionate grounds after the death of her husband, who was working as daily wage plant attendant in the respondent corporation. Though, in the case at hand, petitioner at the first instance was offered job on muster-roll basis for 89 days, but having taken note of her indigent condition, Board of Directors of respondent No.3 not only allowed her salary/pay scale of Rs. 5910+20200+1900 GP on compassionate Grounds, but also placed her services on the secondment basis in the department of respondent No.2, wherein admittedly, she came to be absorbed permanently vide order dated 2.12.2011 (A-6).

3. There is/are no law/instructions, which provide for counting of length of service of deceased employee for grant of service benefits etc. to his dependant on his/her appointment on compassionate grounds. Otherwise also, compassionate appointment, if any, offered to the dependant of deceased employee cannot be said to be continuation of service, which was being rendered by the deceased employee prior to his/her death, rather same for all intents and purposes is required to be considered as a new appointment.

4. Mr. Subhash Sharma, learned counsel for the petitioner though made a serious attempt to persuade this Court to agree with his contention that since applicant came to be appointed by the respondent department on compassionate grounds on account of death of her husband, it would be just and expedient that duration of the service so rendered by the late husband of the petitioner be included in the service length of the petitioner, but his aforesaid

argument deserves outright rejection being wholly untenable and contrary to the law. No doubt petitioner came to be appointed as clerk on compassionate grounds, but such appointment was offered to her taking into account indigent circumstances of the family, but definitely not on account of right, if any, accrued in her favour on account of death of her husband. Similarly, service rendered by the deceased husband of the petitioner came to an end with his demise and there is no provision under law, which entitles the petitioner to take benefit of service rendered by her husband prior to death as far as her seniority on the basis of fresh appointment made on compassionate grounds is concerned. Benefits accrued to deceased husband of the petitioner already stand disbursed to the petitioner as well as other family members.

5. Consequently, in view of the above, present petition is dismissed being devoid of any merits.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, JUDGE AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, JUDGE

Om Parkash & another ... Petitioners

versus

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

CWP No. 2529 of 2020
Reserved on 28.9.2020
Date of decision: 7.10.2020

Constitution of India, 1950- Article 226- Petitioners seeking mandamus qua the respondents directly them to declare Dharampur road to avail plying of vehicle enabling the residents to avail the facility of road- Held, that access of road is inbuilt component of constitutionally guaranteed right to life vis-a-vis resident of hilly area- insistence of compliance by the respondents from the petitioner had other land owners to execute the gift deed of land for construction of road breaches constitutional right guaranteed by article 300-A and article 31 of constitutional- Compensation can be awarded to the landowners whose land about the road- Petition allowed- Respondents directed to provide facility of Dharampur- Rajpura road to the petitioner and other residents and its ----- be ensured with 6 months- Respondents also directed to initiate statutory mechanism for granting compensation to the landowners whos eland about the road or who omit to execute gift deeds of their land. (Paras 3, 4, 5 & 6).

Cases referred:

Vidya Devi vs. State of H.P. & others, and, reported in 2020 (2) SCC 569;
State of H.P. vs. Umed Ram, reported in AIR 1986 SC 847;

For the petitioner: Mr. Romesh Verma, Advocate.
For the respondents: Mr. Hemant Vaid, Addl. A.G. with Mr. J. S. Guleria.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The petitioners, seek a mandamus becoming pronounced, upon the respondents, qua, Dharampur-Rajpura road, becoming declared fit, for, plying of vehicles thereon, hence, for enabling the residents, of, the area concerned, to ensure the plying thereon(s), of, HRTC buses, for, theirs thereafter, availing the facility, of, making road communication(s) therefrom. Furthermore, directions are also strived, to be made upon the respondents, for, declaring illegal, and, nonest Annexure P-1, (i) wherethrough, the respondents became hence constrained, to, decline, the, making, of, a declaration, vis-a-vis, afore road being fit, for, plying vehicles, hence thereon, (ii) inasmuch as, completion of the afore road being made, subject to the land owners concerned, whose lands abut the afore link road, commencing from Dharampur-Rajpura, rather executing gift deeds, vis-a-vis, their apposite lands, and, qua the respondents.

2. The respondents, in the reply, meted by them, to the writ petition, also cast therein, the afore objections, for, theirs omitting, to, make, the declaration, as become(s) strived through the extant writ petition. The trite legal conundrum, hence besetting this Court, for, its becoming resolved, through, an adjudication being made thereon, (a) is the validity, of, afore projected resistance qua the rendition, of, the espoused direction, inasmuch as, its hence falling within the domain, and, ambit, of, expostulation(s), of, law, and, within the notion, of, a, beneficent welfare State, hence conceiving, through a special legislation, the peremptory requirement(s), of, acquisition of apposite lands, hence for ensuring qua therethrough, the constitutional mandate(s), enshrined in Article 300-A, and, in Article 31 becoming not breached, and, rather therethroughs becoming enlivened.

3. The Hon'ble Apex Court in a decision, pronounced in case titled, as, **State of H.P.** vs. **Umed Ram**, reported in **AIR 1986 SC 847**, has made thereon, a, declaration, (a) vis-a-vis, the right to life created, through Article 31 of the Constitution of India, embracing not only mere human existence, but also quality of life, and, for residents of hilly areas, the access of road, is, the access to life. Furthermore, it also becomes expostulated therein, that, denial, of, access to road, to the residents of hilly areas, would tantamount to denial to them, of, the constitutionally guaranteed right to life. Consequently, access to roads, vis-a-vis, the residents, of, hilly areas, is, an inbuilt component, of, the constitutionally guaranteed right to life, and, any denial thereof, to the residents of hilly areas, would tantamount, to the, afore constitutionally guaranteed fundamental right to life, hence becoming breached and infringed. In other words, the afore right, is, an inviolable fundamental right, and, does not brook, any, of

the afore opposition(s) thereto, as, become projected by the State, nor does withstand any, hence free from compensation, rather, compulsive expropriation, of, land(s), and, properties, of, land owners.

4. Be that as it may, the respondents strived to deny the afore constitutionally guaranteed right to life, inasmuch as, the fundamental right to access to roads, vis-a-vis, the petitioners, (i) merely, upon a policy decision, becoming taken by them, inasmuch as, the construction of a public road, commencing from Dharampur-Rajpura, becoming unamenable, for completion, (ii) as the petitioners, and, other land owners rather declining to execute gift deeds qua therewith, vis-a-vis, the respondents. The insistences, of, compliance(s), by the apposite respondents, upon, the afore apposite policy decision, as, taken by the respondents, rather by the writ petitioners, does visibly tantamount, to the respondents therethrough, striving to ensure untenable expropriation, of, the private properties, of, those land owners, whose lands abut the afore road, (iii) and, the afore forcible expropriation, as hence strived, through the afore policy decision, appears to visibly infringe the mandate(s), made, by the Hon'ble Apex Court, in a decision, rendered in, **Vidya Devi** vs. **State of H.P. & others**, and, reported in **2020 (2) SCC 569**, (iv) wherein it becomes expostulated, vis-a-vis, the afore denial, of, compensation to the land owners, despite his/her land becoming utilized, for, construction, of, a public road, bringing forth breaches, of, Article 300-A, and, of Article 31, of, the Constitution of India, (v) moreso, when no compensation qua therewith, become assessed, in consonance with the apposite acquisition laws, (vi) moreover, thereupon hence breach has also become encumbered, upon, the, expostulation of law, hence enshrined, in, Umed Ram's case (supra).

5. Even though, right to property, is, a constitutional right, however, subject to compensation being assessed, vis-a-vis, the land owners concerned, and, whose lands, abut the public road concerned, whereupon, all the respondents, cannot breach, the afore fundamental right, as they strive to do, on anvil, of, an untenable infringing therewith rather policy decision, being taken by the Government. The respondent is a welfare State, and, is duty bound under law, to provide access to road facilities, to the petitioners, and, other residents, who upon, completion, of a public road, nomenclatured as, Dharampur-Rajpura, would enjoy the facility, of, plying their vehicles thereon(s), and, also would enjoy facility, of, plying thereon(s), of, HRTC buses, (i) and, when the aforestated access to a road, is an insegregable component, of, the constitutionally guaranteed right, to life, (ii) thereupon, the afore constitutionally guaranteed right to life, cannot, at all be conceived to be breached, even through, the afore constitutionally void policy decision, being taken by the respondents. Furthermore, the aforestated policy decision, also manifestly breaches, the constitutional right, vested in private land owners

concerned, through Article 300-A, and, Article 31, of, the Constitution of India, and, also the afore constitutionally guaranteed right of property, especially and reiteratedly, with, the afore policy decision, visibly appearing, to, hence militate thereagainst.

6. With the afore observations, the extant writ petition is allowed, and, in sequel, the respondents are directed to provide the facility of road to the petitioners, and, other residents, who become benefited, through completion of road Dharampur-Rajpura, and, the afore completion be ensured to be done, within six months, from today, and, also within the afore period, the respondents are directed to initiate/recourse, the apposite statutory mechanism(s), for, granting compensation to the land owners, whose land abut the afore road, and who omit, to, execute the apposite gift deeds, with, the respondent(s) concerned. All pending applications, if any, also stand disposed of.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, JUDGE AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, JUDGE

Ashwani Kumar & others .....Petitioners.

Versus

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

CWP No. 3517 of 2020
Reserved on: 30.09.2020
Decided on: 13.10.2020

Constitution of India, 1950:- Article 226- Petitioner no 1- since birth residing in village and post office Nerwa district Shimla, completed education in state of H. P. petitioners no 2 and 3, his sons residing with him since birth on above address-petitioner no 1 applied for bonafide himachali certificates of his sons petitioners 2 and 3- application rejected - petitioner filed present writ petition for issuance of directions to state to issue bonafide himachali certificates in favour of petitioners no 2 and 3

As per reply- applications were rejected –as certificates of concerned panchayats not attached- bonafide himachali certificates issued during pendency of petition - writ of mandamus issued to additional secretary revenue to issue appropriate direction to all concerned that if applicant produces any of prescribed documents that will be sufficient material proof for issuance of certificate

For the petitioners: Mr. Suneel Awasthi, Advocate.

For the respondents: Mr. Hemant Vaid and Mr. Ashwani Sharma, Additional Advocates General, with Mr. J.S. Guleria, Deputy Advocate General.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The petitioners, by way of the extant writ petition, are seeking the following substantive reliefs:

> *"(i) Writ in the nature of certiorari may kindly be issued to quash the decision taken in regarding application No. BH2020825262446882 which was conveyed to the petitioners by S.M.S. dated 28.08.2020.*
>
> *(ii) Writ in the nature of mandamus may kindly be issued directing the respondent's authorities to issue the bonafide Himachal certificate to the petitioners in a time bound manner."*

2. Tersely, the facts, as per the petitioners, encapsulated in the petition, essential for adjudication of this petition, are that petitioner No. 1, Shri Ashwani Kumar, since his birth continuously residing in Village & Post Office Nerwa, Tehsil Nerwa, District Shimla, H.P. and completed his education, upto Graduation, in the State of Himachal Pradesh. Petitioners No. 2 and 3 are sons of petitioner No. 1 and since their birth, they are also residing with petitioner No. 1 on the above address. Father of petitioner No. 1 served in Himachal Pradesh State Electricity Board, till his demise, and thereafter, sister of petitioner No. 1 was given compassionate employment in the above Board. Petitioner No. 1, with a hope to get admitted his sons, i.e., petitioners No. 2 and 3, in Army School, for the academic session 2021-22, approached the said School and came to know about requirement of *'bonafide Himachali Certificate'*, as one of the conditions, amongst others, for admission. Thus, petitioner No. 1, by medium of two different applications, alongwith apt documents, approached respondent No. 4 (Tehsildar, Nerwa (Chopal), Shimla, H.P.), for issuance of *'bonafide Himachali Certificates'*, but both the applications were rejected. Precisely, the petitioners, through the extant petition, are seeking indulgence of this Court upon the arbitrary rejection of the applications by respondent No. 4, for issuance of *'bonafide Himachali Certificates'*. Lastly, it is prayed that the writ petition be allowed and respondents/State be directed to issue relevant *'bonafide Himachali Certificates'* in favour of petitioners No. 2 & 3.

3. Conversely, respondents No. 2 to 4, by way of filing extensive and detailed reply to the extant petition, resisted and denied the claim of the petitioners. As per the respondents, the applications of petitioners No. 2 and 3 were rejected by respondent No. 4, as the same were received with Adhaar Card and copy of family register only and certificate of concerned Pradhan of Gram Panchayat or local authority was not attached with the applications, which eventually formed reason for rejection of the applications. The respondents also took doctrinaire stand that the petitioners, after rejection of their applications, did not, within statutory period of 30 days, as contemplated through amendment made in Chapter 28, Para No. 28.21 of the

Himachal Pradesh Land Records Manual, 1992, by the Government, vide Notification No. Rev.B(3)-1/2004- vol-1, dated 20.12.2010, make appeal to the concerned Sub Divisional Officer (Civil), so rejections have attained finality, being unchallenged. On this ground, respondents sought dismissal of the extant writ petition.

4. Respondents No. 2 to 4 further contend that upon re-filing of the applications alongwith apposite documents, *'bonafide Himachali Certificates'* were issued in favour of petitioners No. 2 and 3 on 14.09.2020 and 15.09.2020, respectively.

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

6. The learned counsel for the petitioners has argued that action of respondent No. 4 in rejecting the applications for issuance of bonafide certificates to petitioners No. 2 and 3 is highly arbitrary, illegal, unconstitutional, discriminatory and violative of Articles 14 and 21 of the Constitution of India, so the writ petition be allowed. He has further argued that during the pendency of the present writ petition bonafide certificates were issued in favour of petitioners No. 2 and 3. Per contra, the learned Additional Advocate General has argued that the applications of petitioners No. 2 and 3 were received with copies of Adhaar Card and copy of family register only and no certificate of Pradhan of Gram Panchayat concerned or local authority was attached, which resulted in rejection of the applications. He has further argued that as the petitioners did not prefer any appeal, within the statutory period of 30 days to Sub Divisional Officer (Civil), now the extant writ petition is not maintainable. Lastly, he has prayed for dismissal of the writ petition.

7. At the very outset, it would be worthwhile to note that during the pendency of the present writ petition, petitioners No. 2 and 3 were issued *'bonafide Himachali Certificates'* by respondent No. 4, when lacking condition was made good by the petitioners, so virtually petitioners' grievance stands fully redressed. However, as, in the present *lis*, a larger public interest is involved, and the Courts cannot shut its eyes to the apathy of law, which leads common people to run from pillar to post for issuance of certificates, through instrumentalities of State. Being a welfare State, the government is accountable for the individual and social welfare of its citizens. Orb of welfare State, with every passing day, is increasing and the Courts cannot allow the concept of welfare State to remain half-conscious or in text books only.

8. A well settled principle of law is *'ubi jus ibi remedium'*, which means 'where there is right, there is remedy'. The above settled principle, to some extent, seeks lateral support from another settled principle of law, viz., *'vigilantibus, non dormientibus, jura subveniunt'*, which means, the law assists those that are vigilant with their rights, and not those that sleep thereupon. In the present case, even the vigilant persons were knotted in

unnecessary/superfluous/repetitive conditions, which, with the passage of time have lost sheen and become obsolete. In the present case, non-issuance of *'bonafide Himachali Certificates',* to petitioners No. 2 and 3, which were purportedly required for admission in a school, by the respondents/State ultimately gave birth to the instant petition. So, keeping in view the larger public interest involved, to abridge the lacunae in the relevant rules and also to simplify the rigors of prerequisites for procuring different certificates from the government offices, we propose to frame comprehensive guidelines concerning the field.

9. Before passing the comprehensive guidelines, present conditions in vogue need to be highlighted, which are extracted as under:

> *"(i) The person concerned is having permanent home in H.P.; or*
>
> *(ii) Residing in H.P. for a period of 20 years or above; or*
>
> *(iii) Having his permanent home in H.P. but living outside H.P. on account of his occupation."*

The expression "person" occurring in condition (i) and impliedly occurring in rest of the conditions, applies to citizens and non-citizens alike. Perceptibly, out of the above enumerated conditions, only one, out of all, is required for applying for a *'bonafide Himachali Certificate,* as expression "or" is purposely mentioned. Out of the above conditions, condition (ii) has supple connotations and it cannot be construed in a constricted manner, as has been done in the present case. Thus, present is an example, as to how inflexibly the above condition was interpreted by the State authorities.

10. At this stage, it would be advantageous to evaluate literary meaning of expressions "bonafide" and "resident". "Bonafide" means in good faith or genuinely; in other words, it conveys absence of intent to deceive and expression "resident" means someone who lives at a particular place for a prolonged period or who has born there. Thus, in simple words, a bonafide resident is an individual who, genuinely, lives in a given place for a prolonged period or born there. However, "bonafide resident" in legal paradigm means *an individual who has been determined by the local department of social services to be residing in the city or country where making application at the time of or immediately prior to medical treatment with the intent of remaining permanently in that locality and who did not establish residency for the purposes of obtaining benefits".* Therefore, a bonafide certificate simply establishes that holder of the same actually lives in a particular State. In other words, bonafide resident is a person who stayed in a particular location of a State and for a duration, which is required by the applicable statute(s).

11. After examining the above literary meaning, vis-à-vis, the relevant statute(s) in vogue, for acquiring bonafide certificate, one must be physically residing, for an uninterrupted

period of 20 years within the State of Himachal Pradesh. Needless to say, those children, who are born in Himachal Pradesh and their parents uninterruptedly residing in Himachal Pradesh are automatically eligible for bonafide certificates.

12. Now, it would be profitable to highlight and extract the latest amendment in Chapter 28 of the H.P. Land Records Manual, 1992, which, as per the respondents, was notified by the Government vide Notification No. Rev.B.(3)1/2004-Vol-1, dated 20.12.2010, which is as under:

"Chapter:-28

Para 28. I shall be substituted as under:-

"28.1- The Tehsildar/Naib Tehsildar Mohal shal be the competent authority to issue SC/ST, income, backward class and bonafide/domicile Himachali certificates within their respective jurisdiction."

"Chapter 28,14-shall be substituted as under:-

Procedure for issuing Bonafide/Domicile Himachali Certificate. The applicant shall submit an application for obtaining Bonafide/Domicile Himachali certificate in Form-F along with a passport size photograph. The photograph shall be affixed on the certificate, to be issued on Form G, with the seal of the competent authority thereon. The certificate shall be issued on the basis of report/inquiry of Patwari Halqua, certificates of Pradhan Gram Panchayat/President M.C./Executive Officer Municipal Corporation concerned in accordance with the H.P. Govt. letter No. 12-7/73 SAD dated 18th August, 1972 and instructions of Govt. as per Appendix-D of this chapter further amended by instructions No. Per (AP-B) A(3)-1/2000-Vol-II dated 1st August, 2009. A register of certificates issued under this para shall be maintained in form R-1 and a photocopy of the certificate issued shall be maintained for record."

After para 28.19 the following new paras shall be added:-

"28.20-Cancellation of Certificate issued:-In case the issuing authority, either on a complaint or on receipt of information from any source, has reason to believe that any certificate has been issued wrongly, he shall after making such enquires and hearing such persons as considered necessary and affording a reasonable opportunity of being heard to the person to whom the certificate had been issued, cancel such certificate.

28.21 Appeal:- A person aggrieved by such order may within a period of 30 days file an appeal before the Sub-Divisional Officer (C)

to whom the Tehsildar/Naib Tehsildar/Naib Tehsildar is subordinate and the Sub-Divisional Officer (C) after giving the parties an opportunity of being heard, reverse or confirm the cancellation order and such reversal or confirmation shall be final."

Both, the conditions and amendment (supra), are not under contest and constitutional validity of the same is also not under challenge, as no arguments qua the same have been addressed by either of the party. So, without touching the constitutional validity and reasonableness of the conditions and amendment (supra), we are of the considered view that no abstract standard/straight jacketed formula/general pattern can be laid down, which can be applicable to test the constitutional validity and reasonableness of the statute concerned or rules framed thereunder.

13. Be that as it may, upon a harmonious reading of conditions and amendment, extracted hereinabove, the same cannot be said to be unreasonable. Otherwise also, to test the fact that the person has a bonafide intention to reside in Himachal Pradesh will be clear, if he is residing continuously in State of Himachal Pradesh for the last 20 years or more, as encapsulated in condition (ii) (supra). Moreover, the above extracted notification, qua amendment, states that if any one of the above extracted conditions is satisfied, the person will be considered as bonafide resident of Himachal Pradesh. Now, as discussed hereinabove, condition (ii) (supra) has supple connotations, so any legally accepted document, declaring a person residing within the State of Himachal Pradesh, for the last 20 years or more, can be a strong and undeniable basis for issuing bonafide certificate to an individual.

14. A bare reading of the above extracted amendment is only germane, vis-à-vis, empowered authorities of the government to issue certificate(s), upon a report, for procuring *'bonafide Himachali Certificate'* and these authorities are Patwari Halqua, Pradhan of Gram Panchayat, President M.C. and Executive Officer Municipal Corporation. Thus, a combined reading of the above amendment and condition (ii), i.e., *"Residing in H.P. for a period of 20 years or above",* simply means that only Patwari Halqua, Pradhan of Gram Panchayat, President M.C. and Executive Officer Municipal Corporation are empowered to issue a certificate, upon a relevant report, for issuance of *'bonafide Himachali Certificate'* and under condition (ii) a person should be continuously residing in the territory of Himachal Pradesh for the last 20 years. If condition (ii) is satisfied, then a person cannot be deprived *'bonafide Himachali Certificate'.*

15. Now, the decisive question is that in case a person has revenue record in his/her name or in his/her father's name, then there is undisputed proof of residence, which is

jointly called for by the issuing authority(ies), in the nature of a report of Patwari, but there may be many persons, who do not have any revenue record in their names. For such persons, we are of the opinion that document(s) establishing the factum of theirs' residing in the State of Himachal Pradesh for the last 20 years or more or his/her's being born in Himachal Pradesh, can also be considered for issuance of bonafide certificate.

16. Here, in the present case, the moot questions are: (a) why Condition (ii) supra is to be rigidly interpreted, depriving people from being issued bonafide certificates, required for sundry usage; (b) what can be the basis, whereupon, bonafide certificates can be issued, other than the existing basis; and (c) in what manner the process of issuing the same can be simplified. As discussed hereinabove, condition (ii) (supra) has supple connotations, so interpreting the same rigidly is unjustifiable. Manifestly, out of the above enumerated three conditions, only one condition is to be satisfied for issuance of bonafide Himachali Certificate, only then a person is recognized as bonafide resident of Himachal Pradesh.

17. After analyzing the law on the subject, notifications issued by the government from time to time, this Court comes to the conclusion that in order to streamline the process of issuance of various certificates, viz., bonafide, BPL/APL, SC/ST/OBC category, Economically Weaker Sections of the Society and certificates to physically challenged persons qua their physical disability(ies), the concerned authorities will issue reports/certificates, if, any one of the following documents, as the case may be, are produced before the said authority(ies):

1. For issuing bonafide certificate(s):

(i) Ration card;

(ii) Employment certificate/identity card issued by employer, i.e., Government Office(s) showing the applicant working in the said office (location/operation whereof is within Himachal Pradesh) for the last 20 years or more;

(iii) Date of birth certificate reflecting the applicant born in Himachal Pradesh;

(iv) Attested copy of *Pariwar* (Family) Register, showing the place of residence of the applicant and reflecting that the applicant for the last 20 years or more residing in Himachal Pradesh;

(iv) Adhaar Card/Voter ID card from 20 years;

(v) Revenue record(s) showing the applicant, continuously for the last 20 years or more, residing in Himachal Pradesh;

(vi) Kisaan pass book;

(vii) Certificate(s) issued by the Panchayat Pradhan, Municipal Counselor, Mayor, President Notified Area Committee, Member Legislative Assembly and Member Parliament to the effect that applicant for the last 20 years or more uninterruptedly/continuously residing in Himamchal Pradesh; &

(viii) Certificate(s) issued by Class I Gazetted Officer working under the Government of Himachal Pradesh and within the State of Himachal Pradesh, stating the applicant is residing in Himachal Pradesh uninterruptedly/continuously for the last 20 years or more;

2. For issuing certificates Below the Poverty Line (BPL) and Above the Poverty Line (APL) and certificate(s) for SC/ST/OBC category, as the case may be, to the bonafide residents of H.P.:

(i) Ration card reflecting that the applicant belongs to BPL/APL family;

(ii) Certificate with respect to name of caste/tribe of father/guardian of the applicant, issued by the employer, i.e., Government Office(s) showing that the applicant or his/her father/guardian is working in the office concerned (location/operation whereof is within Himachal Pradesh);

(iii) Attested copy of *Pariwar* (Family) Register, showing the place of residence of the applicant in Himachal Pradesh and the applicant belonging to a particular caste/tribe;

(v) Revenue record(s) showing the applicant residing in Himachal Pradesh and belonging to caste/tribe;

(vi) Kisaan pass book issued by the Government of Himachal Pradesh showing the applicant belonging to caste/tribe, if any;

(vii) Certificate(s) issued by the Panchayat Pradhan, Municipal Counselor, Mayor, President Notified Area Committee, Member Legislative Assembly and Member Parliament to the effect that applicant belongs to a particular caste/tribe; &

(viii) Certificate(s) issued by Class I Gazetted Officer working under the Government of Himachal Pradesh and within the State of Himachal Pradesh, showing the applicant belonging to a particular caste/tribe.

3. Economically Weaker Sections of the Society to the bonafide residents of Himachal Pradesh:

(i) Certificate(s) issued by the Pradhan of Gram Panchayat, Secretary of Gram Panchayat, Member Panchayat, Secretary Notified Area Committee, Member Notified Area Committee, Member Municipal Committee/Corporation, Mayor/President of the Committee/Corporation and Patwari of the concerned area will be a proof of the fact that the applicant belongs to weaker Section of the Society.

4. Certificates for physically challenged persons to the bonafide residents of Himachal Pradesh:

(i) Certificate(s) issued by Medical Officer of a Dispensary/Medical Board, in accordance with the guidelines in vogue, will be a proof of the fact that the applicant is physically challenged person.

19. Needless to say that the above conditions are in addition to the existing conditions and not in derogation to the instructions issued by the State Government from time to time.

20. In aftermath, a writ of mandamus is issued directing the Additional Secretary (Revenue) to the Government of Himachal Pradesh to issue appropriate direction(s), in the light of the present judgment, to all concerned to the effect that if the person (applicant) while applying for bonafide, BPL/APL/Economically Weaker Sections of the Society, SC/ST/OBC category and Physically Handicapped certificates, produces any one of the above mentioned documents, then it will be sufficient material proof for issuance of relevant certificate to him/her.

21. The above directions are issued, as it is found that many times due to wrong interpretation or delayed interpretation of the existing provisions, people unnecessarily suffer and vigilant people ultimately knock the doors of the Courts, whereas innocent and poor people, who could not afford to come to the Court, due to poverty, illness, ignorance, illiteracy or other reasons, suffer.

22. The writ petition is disposed in the above terms. Pending miscellaneous application(s), if any, shall also stand(s) disposed of.

BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Satishwar Sharma .....Petitioner.

Versus

Cholamandalam Investment and Finance Company Ltd. & anr.

.....Respondents.

CMPMO No. 128 of 2017

Date of decision: October 15, 2020.

Constitution of India, 1950- Section 8 and Section 5 of Arbitration and Conciliation Act **–** Article 227 – The petition challenging the order dt 09.01.2017 passed by ld civil judge allowing the application under section 8 read with section 5 of Arbitration and conciliation Act and holding civil suit filed by petitioner not maintainable The petitioner filed a civil suit for declaration ,permanent and mandatory injunction and damages - defendant financed amount to petitioner for purchase of vehicle- on default of payment of installments –defendant forcibly took possession of vehicle-petitioner filed civil suit alleging snatching of vehicle as illegal and void-parties at the time of financing the vehicle entered into an agreement providing for settlement of disputes by arbitration in accordance with Act in clause-29 -HELD-In the instant case ,allegations of fraud have not been specifically raised in the civil suit. In fact the petitioner had himself relied on the agreement dated 24.3.2012 to factually assert regular payments of loan installments till April 2016 in lieu of loan advanced by the respondents under the agreement. Whether in such circumstances he can even take the plea of fraud is questionable. Nonetheless the plea taken by him in the present petition is not such which will come in the way of enforcement of Clause-29 of the agreement- the civil suit filed by the petitioner was not maintainable.

Cases referred:

A. Ayyasamy versus A. Paramasivam and Others, (2016) 10 SCC 386;

M/s Sundaram Finance Limited and another v. T. Thankam, AIR 2015 SCC 1303;

For the petitioner : Mr. Suneet Goel, Advocate.

For the respondent : Mr. Arvind Sharma, Advocate, for respondent No. 1.

None for respondent No. 2.

(through Video Conferencing).

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, *Judge (Oral)*

As a consequence of allowing of application moved by respondent under Section 8 read with Section 5 of the Arbitration and Conciliation Act, 1996, the civil suit filed by the petitioner was held to be not maintainable. Aggrieved, the petitioner has moved this Court under Article 227 of Constitution of India.

2(i) Petitioner/plaintiff filed a civil suit for declaration, permanent and mandatory injunction along with prayer for damages. It was pleaded that respondents/defendants had financed ₹9,05,150/- to the petitioner for purchase of a vehicle (Tata Truck 1109). This loan amount was to be repaid within 43 equal monthly installments @ ₹26,332/-. It was asserted

that till April 2016 the petitioner had repaid more than ₹10,56,000/- against due amount of ₹11,32,276/-. He had defaulted in payment of some installments. The respondents thereafter took forcible possession of the vehicle. Alleging that action of respondents was illegal and arbitrary, civil suit was filed by the petitioner for declaration to the effect that '*snatching of vehicle by the defendants be declared as illegal and void* '. A further prayer was made for a decree of mandatory injunction *'to direct the respondents to release the vehicle in favour of the petitioner on receiving balance amount of ₹76,276/-'*. Respondents were also sought to be restrained from causing any interference in petitioner's plying the vehicle. ₹5,00,000/- on account of damages were prayed for.

2(ii) The respondents moved an application under Section 8 read with Section 5 of the Arbitration and Conciliation Act for referring the parties to arbitration. The gist of the application was that at the time of granting financial assistance in the sum of ₹9,05,150/- for the purchase of vehicle bearing No. HP-71-1474, the parties had executed a loan agreement on 24.3.2012 whereunder the loan amount was to be repaid in 43 equal monthly installments for `26,332/-. Clause-29 of the agreement provided for settlement of disputes between the parties arising out of the agreement whether during its subsistence or thereafter, by Arbitration in accordance with Arbitration and Conciliation Act, 1996. In view of Clause-29 the respondents pleaded that dispute between the parties arising out of the written agreement has to be settled by the Arbitrator and, therefore, the civil Court has no jurisdiction to entertain the civil suit.

2(iii) Learned Civil Judge(Junior Division), Nahan, District Sirmour vide order dated 9.1.2017 allowed the application moved by the respondents and held the suit to be not maintainable. The parties were directed to approach the Arbitrator in terms of Claus-29 of the agreement dated 24.3.2012.

3. Learned Counsel for the petitioner contended that the relief of declaration cannot be adjudicated by the Arbitrator. He further submitted that the petitioner had levelled allegations of fraud against the respondents. In such circumstances, the dispute could not be resolved by the Arbitrator. He thus prayed for restoration of civil suit to its original number for its decision on merits. Learned Counsel for the respondent pleaded no instructions.

4. Position which emerges from record is that:-

4(i) On 24.3.2012 an agreement was executed between the parties whereunder the petitioner was advanced a sum of ₹9,05,150/- for purchase of a truck. The loan amount was to be repaid in 43 equal installments of ₹26,332/- per month. The petitioner has himself has relied upon this loan agreement while making factual assertions of regular repayment of the loan amount. Clause-29 of the agreement executed between the parties is reproduced as under:

> *"All dispute, differences and/or claims arising out of this agreement whether during its subsistence or thereafter shall be settled by Arbitration in accordance with the provisions of The Arbitration and Conciliation Act 1996 or any statutory amendments thereof and shall be referred to the sole arbitration of an arbitrator nominated by the Company. The award given by such Arbitrator shall be final and binding on all parties to this agreement. In the event of an appointed Arbitrator dying or being unable or unwilling to act as Arbitrator for any reason, the Company, on such death of the Arbitrator or his inability or unwillingness to act as arbitrator, shall appoint another person to act as arbitrator. Such person shall be entitled to proceed with the reference from the stage left by his predecessor. The venue or arbitration proceeding shall be at Chennai at the Registered Office of the Company which is presently at 'DARE HOUSE', No. 2(OLD No. 234) NSC BOSE ROAD, PARRYS, Chennai-600-001 or such other place/location/city which the company at its discretion may decide from time to time." Further as per terms of the agreement, it is mutually agreed between the parties that court in Chennai shall have exclusive jurisdiction."*

The clause clearly provides for adjudication of dispute between the parties by the Arbitrator. In ***AIR 2015 SCC 1303***, titled ***M/s Sundaram Finance Limited and another*** v. ***T. Thankam,*** it was held in para-15 that 'Once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statue, the civil court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the special statute. The general law should yield to the special law-generalia specialibus non derogant. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court'.

While supplementing the judgment in (2016) 10 SCC 386, titled ***A. Ayyasamy*** versus ***A. Paramasivam and Others***, Hon'ble Mr. *Justice Dr. D.Y. Chandrachud, J.* in paragraphs-45 (extracted hereinafter) held that once there is an arbitration agreement between the parties then the judicial authority before whom an action is brought covering the subject matter of the arbitration agreement is under a positive obligation to refer the parties to arbitration, there is no element of discretion left in the court or the judicial authority-

> *"45. The position that emerges both before and after the decision in N. Radhakrishnan is that successive decisions of this Court have given effect to the binding precept incorporated in Section 8. Once there is an*

arbitration agreement between the parties, a judicial authority before whom an action is brought covering the subject matter of the arbitration agreement is under a positive obligation to refer parties to arbitration by enforcing the terms of the contract. There is no element of discretion left in the court or judicial authority to obviate the legislative mandate of compelling parties to seek recourse to arbitration. The judgment in N. Radhakrishnan has, however, been utilised by parties seeking a convenient ruse to avoid arbitration to raise a defence of fraud."

4(ii) Learned Counsel for the petitioner then submitted that arbitration agreement executed was the result of fraud practiced upon the petitioner, therefore, also the dispute cannot be adjudicated by the arbitrator. It may be noticed here that no such plea has been specifically taken by the petitioner in his civil suit. Secondly, the question of applicability of arbitration clause vis-a-vis disputes alleged in the nature of frauds etc. is no longer *res integra.* In ***(2016) 10 SCC 386,*** titled ***A. Ayyasamy*** versus ***A. Paramasivam and Others***, the respondents had moved an application under Section 8 of Arbitration and Conciliation Act, 1996 raising an objection to the maintainability of the suit in view of arbitration agreement between the parties. The application was resisted by the appellant with the submission that acts of fraud attributed to the appellant by the respondent/plaintiff could not be adjudicated upon by the Arbitral Tribunal and appropriate remedy was to approach civil Court by filing a civil suit. In following para-14 of the judgment the observation was that disputes relating to fraud were generally considered as non-arbitrable:

"14. In the instant case, there is no dispute about the arbitration agreement inasmuch as there is a specific arbitration clause in the partnership deed. However, the question is as to whether the dispute raised by the respondent in the suit is incapable of settlement through arbitration. As pointed out above, the Act does not make any provision excluding any category of disputes treating them as non-arbitrable. Notwithstanding the above, the Courts have held that certain kinds of disputes may not be capable of adjudication through the means of arbitration. The Courts have held that certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. The following categories of disputes are generally treated as non-arbitrable:

(i) patent, trademarks and copyright;
(ii) anti-trust/competition laws;
(iii) insolvency/winding up;
(iv) bribery/corruption;
(v) fraud;

(vi) criminal matters.

Fraud is one such category spelled out by the decisions of this Court where disputes would be considered as non-arbitrable."

In paragraph-18 of the same judgment (reproduced hereinafter) it was held that mere allegation of fraud in the pleadings by one party against the other cannot be a ground to hold that the matter is incapable of settlement by arbitration and should be decided by the civil Court:

> *"18. When the case involves serious allegations of fraud, the dicta contained in the aforesaid judgments would be understandable. However, at the same time, mere allegation of fraud in the pleadings by one party against the other cannot be a ground to hold that the matter is incapable of settlement by arbitration and should be decided by the civil court. The allegations of fraud should be such that not only these allegations are serious that in normal course these may even constitute criminal offence, they are also complex in nature and the decision on these issues demand extensive evidence for which civil court should appear to be more appropriate forum than the Arbitral Tribunal. Otherwise, it may become a convenient mode of avoiding the process of arbitration by simply using the device of making allegations of fraud and pleading that issue of fraud needs to be decided by the civil court. The judgment in N. Radhakrishnan does not touch upon this aspect and the said decision is rendered after finding that allegations of fraud were of serious nature."*

The Hon'ble Apex Court in paragraph-25 (extracted hereinafter) concluded that mere allegation of fraud simpliciter will not be ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the court finds that there are very serious allegations of fraud which make it a virtual case of criminal offence that it becomes essential for decision of such complex issue to be rendered by civil court on appreciation of evidence that the Court can sidetrack the arbitration agreement and can dismiss the application under Section 8.

> *"25. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simplicitor may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the Court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil court on the appreciation of the voluminous evidence that needs to be produced, the Court can sidetrack the agreement by dismissing application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against*

the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration. While dealing with such an issue in an application under Section 8 of the Act, the focus of the Court has to be on the question as to whether jurisdiction of the Court has been ousted instead of focusing on the issue as to whether the Court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as non-arbitrable. Such categories of non- arbitrable subjects are carved out by the Courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, Courts, i.e. public fora, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect, viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected."

While supplementing the above judgment, Hon'ble Mr. *Justice Dr. D.Y. Chandrachud, J.* held in para 45.2 as under:

"45.2 Allegations of fraud are not alien to ordinary civil courts. Generations of judges have dealt with such allegations in the context of civil and commercial disputes. If an allegation of fraud can be adjudicated upon in the course of a trial before an ordinary civil court, there is no reason or justification to exclude such disputes from the ambit and purview of a claim in arbitration. The parties who enter into commercial dealings and agree to a resolution of disputes by an arbitral forum exercise an option and express a choice of a preferred mode for the resolution of their disputes. The parties in choosing arbitration place priority upon the speed, flexibility and expertise inherent in arbitral adjudication. Once parties have agreed to refer disputes to arbitration, the court must plainly discourage and discountenance litigative strategies designed to avoid recourse to arbitration. Any other approach would

seriously place in uncertainty the institutional efficacy of arbitration. Such a consequence must be eschewed."

In the instant case allegations of fraud have not been specifically raised in the civil suit. In fact the petitioner had himself relied on the agreement dated 24.3.2012 to factually assert regular payments of loan installments till April 2016 in lieu of loan advanced by the respondents under the agreement. Whether in such circumstances he can even take the plea of fraud is questionable. Nonetheless the plea taken by him in the present petition is not such which will come in the way of enforcement of Clause-29 of the agreement. The case is squarely covered by the judgment passed by Hon'ble Apex Court in *A. Ayyasamy's* case *supra.*

In view of above, the civil suit filed by the petitioner was not maintainable. There is no infirmity in the impugned order relegating the parties to approach the Arbitrator. Accordingly, this petition is dismissed. Liberty is reserved to the petitioner to seek appropriate redressal/remedy with respect to his any other grievances relating to the arbitration agreement. Pending application(s), if any, shall also stand disposed of.

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

CWP No.2001/2015

Kehar Singh & others ....Petitioners

Versus

State of Himachal Pradesh & others ....Respondents.

CWP No.972/2017

Khem Raj ....Petitioner

Versus

State of Himachal Pradesh & others ....Respondents.

CWP No.977/2017

Paras Ram ....Petitioner

Versus

State of Himachal Pradesh & others ....Respondents.

CWP No.2068/2017

Kailash Chand Bhimta & others ....Petitioners

Versus

State of Himachal Pradesh & others ....Respondents.

CWPs No.2001 of 2015, 972,977 & 2068 of 2017
Reserved on : October 13, 2020
Date of Decision: October 15, 2020

Constitution of India, 1950- Article 226-Petitions preferred by employees of respondent-H. P state co-operative bank for omissions and commissions on the part of registrar co operative societies with respect to his statutory duty assigned under rule 56 of H .P co operative societies rules 1971 framed under the Act- petitioners have approached the Court, seeking direction to the respondent, i.e. State of Himachal Pradesh through Secretary (Cooperation), and Registrar of the Cooperative Societies to consider their case for promotion to the post of Assistant Manager (Grade-III) from the post of Executive Assistant, from the date of acquiring diploma, i.e. Higher Diploma Programme in Cooperative Management.

HELD - a writ petition against a Society may or may not be maintainable, depending upon facts and circumstances of the case, however, undoubtedly a writ petition is maintainable against the orders passed by the Registrar with respect to functioning of the Society, exercising statutory powers under the Act or Rules framed thereunder.

Omission on the part of Registrar, to subscribe just and fair procedure to regulate sponsorship of employees of the Bank for Diploma/Certificate course in order of seniority, is a failure to perform statutory duty cast upon him under Statutory Rules 1971. And direction is issued to subscribe just and fair procedure.

Cases referred:

A. Umarani v. Ragistrar, Cooperative Societies and others, (2004) 7 SCC 112;
Anadi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and others versus V.R. Rudani and others, (1989) 2 SCC 691;
Bholanath Roy & Ors. vs. State of West Bengal & Ors., (1996) Vol.1 Calcutta Law Journal 502;
Binny Limited and another v. V. Sadasivan and others with D.S. Veer Ranji v. Ciba Specialty Chemcial (I) and another, (2005) 6 SCC 657;
C.K. Malhotra v. H.P. State Coop. Bank and others, 1993(2) Sim.L.C. 243;
Gayatri De vs. Mousumi Cooperative Housing Society Ltd. & Ors., (2004) 5 SCC 90;
Hukum Chand Gupta v. Director General, Indian Council of Agricultural Research and others, (2012) 12 SCC 666;
J&K Public Service Commission and others v. Dr. Narinder Mohan and others, (1994) 2 SCC 630;
K.K. Saksena v. International Commission on Irrigation & Drainage and others, reported in (2015) 4 SCC 670;
Keshav Chandra Joshi and others v. Union of India and others, 1992 Supp (1) SCC 272;
Mrs. Sobha George Adolfus V.State of Kerala, AIR 2016 Kerala 175;
Nayagarh Co-operative Central Bank v. Narayan Rath & another, (1977) 3 SCC 576;
Oriental Bank of Commerce v. Sunder Lal Jain and another, (2008) 2 SCC 280;
Prabodh Verma and others v. State of Uttar Pradesh and others, (1984) 4 SCC 251;
R.R. Verm and others v. Union of India and others, AIR 1980 SC 146 : (1980) 3 SCC 402;
Rameshwar and others v. Jot Ram and another, (1976) 1 SCC 194;
S.S. Rana v. Registrar, Coop. Societies & another, reported in (2006) 11 SCC 634;
Sanjeev Kumar & others v. State of H.P. & others, Latest HLJ 2014 (HP) 1061;
Shangrila Food Products Ltd. and another v. Life Insurance Corporation of India and another, (1996) 5 SCC 54;
State of Gujarat and others v. Arvindkumar T. Tiwari and another, (2012) 9 SCC 545;
State of U.P. and others v. Harish Chandra and others, (1996) 9 SCC 309;
Thalappalam Service Cooperative Bank Limited and others v. State of Kerala and others, (2013) 16 SCC 82;
Union of India and others v. Muralidhara Menon and another, (2009) 9 SCC 304;

For the Petitioners : Mr. B.C. Negi, Senior Advocate, with Mr. Nitin Thakur, Advocate, in CWPs No.2001/2015 & 2068/2017.

Mr. Deepak Kaushal, Advocate, in CWPs No.972 & 977 of 2017.

For the respondents : Mr. Ashok Sharma, Advocate General, and Mr. Desh Raj Thakur, Mr. Shiv Pal Manhans, Additional Advocates General alongwith Mr. Raju Ram Rahi, Deputy Advocate General, for respondents-State.
Mr. Sunil Mohan Goel and Mr. J.S. Bhagga, Advocates for respondent No.3 – H.P. State Cooperative Bank Ltd.

Dr. Lalit K. Shamra, Advocate, for respondents No.4 to 22 and proposed respondents No.23 to 39 in CWP No.2001 of 2015 and for proposed respondents No.4 to 26 in CWP No.2068/2017.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

For appreciation of common questions of law and facts, all these four Writ Petitions are being decided by this common judgment.

40. These petitions have been preferred by employees of respondent – H.P. State Cooperative Bank Ltd. (hereinafter referred to as Cooperative Bank) for omission and commission on the part of Registrar, Cooperative Societies, Himachal Pradesh (hereinafter referred to as Registrar), with respect to his statutory duty, assigned under Rule 56 of Himachal Pradesh Co-operative Societies Rules, 1971 (hereinafter referred to as Rules 1971), framed by the Government of Himachal Pradesh under the Himachal Pradesh Co-operative Societies Act, 1968 (hereinafter referred to as the Act), with respect to Conditions of Service of employees to be specified by the Registrar.

41. A common preliminary objection has been raised in all these petitions that in view of judgments passed by Division Benches of this court in ***C.K. Malhotra v. H.P. State Coop. Bank and others,*** and other connected matters, decided on 5.3.1993, reported in **1993(2) Sim.L.C. 243;** and ***Sanjeev Kumar & others v. State of H.P. & others,*** decided on 4.8.2014, reported in **Latest HLJ 2014 (HP) 1061,** these petitions are not maintainable being filed against Cooperative Bank.

42. In ***C.K. Malhotra's*** case, petitioners therein had assailed the order passed by the Societies, i.e. Cooperative Bank, Kangra Central Cooperative Bank Ltd. (hereinafter referred to as KCC Bank) and Himachal Pradesh State Cooperative Marketing and Development Federation (HIMFED), under their respective service regulations, against its employees, which were decided, approved or upheld by the Registrar, exercising the powers vested in him under those service regulations framed by concerned Societies.

43. Division Bench of this Court, in ***C.K. Malhotra's*** case, had adjudicated and decided the preliminary objection by holding that the three Societies, including the Cooperative Bank, registered under the Act, cannot be chacacterised as 'other authority' within the ambit of 'State' within the meaning of Article 12 of the Constitution of India and, thus, for nature of non-statutory function performed by the Registrar with respect to order passed by these societies in relation to service matters of its employees, which was not public function performed by the society(ies), these societies, in those cases, were not considered amenable to the jurisdiction of High Court under Article 226 of the Constitution of India. After considering numerous judgments passed by the Apex Court and various High Courts, it was concluded by the Division Bench as under:

> "94. After having applied the tests and finding that none of the tests are satisfied the natural corollary which follows is that the three Societies cannot be characterised as the 'other authority', so as to bring them within the ambit of a 'State' within the meaning of Article 12 of the Constitution.
>
> 95. It was contended by the learned Counsel for the Petitioners that since in some of the cases orders, which have been passed, in accordance with the provisions of the Service Rules have been either upheld or varied by the Registrar, and such order also being under challenge in the writ petition, the writ petition would be maintainable and this Court will be competent to issue suitable directions interfering with the orders so passed by the statutory authority. This submission also has no force. The power which has been exercised by the Registrar is under various service regulations framed by the Societies under their respective Bye-laws by virtue of Rule 9(j) of the Rules and is not a statutory power exercised by the Registrar under the provisions of the Act and Rules. The power exercised is under service regulation framed by the Societies by virtue of powers contained in the Bye laws. Since the bye-law have no force of law as held in *Co-operative Central Bank Ltd. and Ors. v. Additional Industrial Tribunal, Andhra Pradesh, Hyderabad*, AIR 1970 SC 245 and affirmed in *Babaji Kondaji Garad and Ors. v. Nasik Merchanrs Co-operative Bank Ltd, Nasik and Ors*, AIR 1984 SC 192, the service regulations also have no force of law. No doubt, the orders under challenge are passed by the Registrar, but the Registrar has exercised his powers under the service Regulations and not under the Statute or the Rules.

96. In *Nayagarh Cooperative Central Bank Ltd. & Anr. vs. Narayan Rath & Anr.*, (1977) 3 SCC 576, the Supreme Court did not actually decide the question as to whether a writ petition could be maintained against a Cooperative Society but after having reversed the decision of Orissa High Court that the writ petition would lie, the Apex Court observed that such a decision was not strictly in accordance with the other decision of the Court and proceeded to hold that since in that case order which had been passed by the Registrar was also challenged, therefore, the writ petition was maintainable. The order, which the Registrar had passed in the said case was in exercise of his statutory authority in the purported exercise of powers conferred on him. In the instant case, as noticed above, the Registrar has not passed the impugned orders acting as a statutory authority in the purported exercise of powers conferred on him by the Act or the Rules framed there under but such order has been passed by virtue of his having been named an authority to hear and decide appeals in the Service Regulations framed under the Bye-laws which have no force of law. It will not be a statutory exercise of power but on exercise of power under the Bye-laws.

97. The other submission made on behalf of the learned Counsel for the Petitioners that the HIMFED and Banks are discharging public duties stands already answered while dealing with the 5th test, and the consequential submission that writ of Mandamus can be issued also cannot be upheld, since in order that Mandamus may issue, to compel an authority to do something, it must be shown that the Statute imposes a legal duty on that authority and the aggrieved party has a legal right under the Statute to enforce its performance. The rights which the Petitioners are claiming are not the rights under the Statutes, but the same are claimed under the Bye-laws of Society which have no force The Societies are also not discharging any public duty or any public functions and, as such, the writ of Mandamus would not lie.

98. Consequently, we have no hesitation in holding that the three Societies, namely, The Himachal Pradesh State Co-operative Bank Ltd. The Kangra Central Co-operative Bank Ltd., and the Himachal Pradesh State Co-operative Marketing and Development Federation Ltd., are not 'other authorities' and, as such, cannot be characterised as 'State' within the meaning of Article 12 of the Constitution and the same are also not authority within the meaning and for the purpose of Article 226 of the Constitution. Order passed by the Societies under their respective service regulations against its employees, as such, or in connection with employment cannot be corrected by way of writ petitions. The petitions also would not be maintainable in order to challenge the action of the Registrar since the same is not an exercise of statutory power conferred upon him under the provisions of the Act or the Rules but an exercise of powers by him under service regulations framed under Bye-laws having no force of law. The writ petition also will not be maintainable since none of the three Societies are discharging any public functions.

> 99. In view of our having upheld the preliminary objection all the writ petitions are dismissed as not maintainable in this Court for the reliefs claimed. We leave the parties to bear their respective Costs."

44. In another case, ***S.S. Rana v. Registrar, Coop. Societies & another,*** reported in **(2006) 11 SCC 634,** between KCC Bank and its employee, the employee had approached the Apex Court against dismissal of his petition by this High Court on the ground that writ petition was not maintainable. In that case, the Managing Director of KCC Bank had terminated the services of the employee, which was affirmed by the Board of Directors of KCC Bank by dismissing the appeal preferred by the employee. In this case also, the Supreme Court had concluded as under:

> "14. Respondent 1 does not satisfy any of the tests laid down in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology,* (2002) 5 SCC 111*,* we are of the opinion that the High Court cannot be said to have committed any error in arriving at a finding that the respondent-Bank is not State within the meaning of Article 12 of the Constitution of India."

However, the Supreme Court has also observed as under:

> "15. We are, however, not oblivious of the three judge Bench decision in *Gayatri De vs. Mousumi Cooperative Housing Society Ltd.*, (2004) 5 SCC 90, wherein this Court held a writ petition to be maintainable against the cooperative society only stating:
>
> > "55. We have, in paragraphs supra, considered the judgments for and against on the question of maintainability of writ petition. The judgments cited by the learned Senior Counsel appearing for the respondents are distinguishable on facts and on law. Those cases are not cases covered by the appointment of a Special Officer to manage the administration of the Society and its affairs. In the instant case, the Special Officer was appointed by the High Court to discharge the functions of the Society, therefore, he should be regarded as a public authority and hence, the writ petition is maintainable."
>
> .....
>
> 16. Our attention has also been drawn to *U.P. State Cooperative Land Development Bank Ltd. vs. Chandra Bhan Dubey & Ors.,* (1999) 1 SCC 741, wherein the writ petition was held to be maintainable principally on the ground that it had been created under an Act. Reliance has also been placed upon *Ram Sahan Rai vs. Sachiv Samanaya Prabandhak & Anr.*, (2001) 3 SCC 323, wherein again the appellant thus was recruited in a Society constituted under the U.P. Cooperative Land Development Bank Act, 1964 and this Court, having examined different provisions of rules, bye-laws and regulations, was of the firm

opinion that the State Government exercised all-pervasive control over the Bank and moreover its employees were governed by statutory rules, prescribing an entire gamut of procedure of initiation of disciplinary proceedings by framing a set of charges culminating in inflicting of appropriate punishment, after complying with the requirements of giving a show-cause and an opportunity of hearing to the delinquent.

17. It is, therefore, evident that in *Ram Sahan Rai (supra)* also the cooperative society was held to be established under a statute. We may notice that in *Nayagarh Cooperative Central Bank Ltd. & Anr. vs. Narayan Rath & Anr.*, (1977) 3 SCC 576, this Court was of the opinion that:

> "5. The High Court has dealt with the question whether a writ petition can be maintained against a cooperative society, but we are inclined to the view that the observations made by the High Court and its decision that such a writ petition is maintainable are not strictly in accordance with the decisions of this Court. We would have liked to go into the question for ourselves, but it is unnecessary to do so as Respondent 1 by his writ petition, was asking for relief not really against a cooperative society but in regard to the order which was passed by the Registrar, who was acting as a statutory authority in the purported exercise of powers conferred on him by the Cooperative Societies Act. The writ petition was in that view maintainable."

18. We may notice in some decisions, some High Courts have held wherein that a writ petition would be maintainable against a society if it is demonstrated that any mandatory provision of the Act or the rules framed thereunder, have been violated by it. [See *Bholanath Roy & Ors. vs. State of West Bengal & Ors.,* (1996) Vol.1 Calcutta Law Journal 502]."

45. A Full Bench of this Court had an occasion to decide a reference made by a Division Bench, vide order dated 20.7.2012, in CWP No.3634 of 2012, titled as ***Vikram Chauhan v. Managing Director, Kangra Central Cooperative Bank Ltd.***, which reads as under:

> "Whether the Kangra Central Co-operative Bank, the Himachal Pradesh State Co-operative Bank Ltd. and the Jogindra Central Co-operative Bank, are 'State' within the meaning of Article 12 of the Constitution of India and whether a writ would lie against them?"

46. Vide judgment dated 14.5.2013, the Full Bench of this Court in ***Vikram Chauhan's*** case, reported in **Latest HLJ 2013(HP) 742(FB)**, had answered this question as under:

> "15. For the view taken by us on both facets of the referred questions, we proceed to answer the Reference as under:

(1) The question as to whether Kangra Bank is a State within the meaning of Article 12 of the Constitution of India, is no more res integra. It has been authoritatively answered by the Apex Court in *S.S. Rana v. Registrar, Coop. Societies & another,* reported in (2006) 11 SCC 634.

(2) Even in the case of H.P. State Cooperative Bank Ltd., the question has been answered by the Division Bench of our High Court in *C.K. Malhotra v. H.P. State Coop. Bank and others,* 1993(2) SLC 243. There is no conflicting decision of coordinate Bench of this Court necessitating pronouncement on that question by the Full Bench.

(3) In the case of Jogindra Central Cooperative Bank, the decision in *Mehar Chand & another vs. Jogindera Central Cooperative Bank,* CWP No.641/2002, decided on 26.9.2007*,* is rendered by the learned Single Judge of this Court and no conflicting decision of the co-ordinate Bench muchless of the Division Bench or Larger Bench of our High Court with regard to the stated Bank has been brought to our notice. In any case, the said question can be conveniently answered by the Division Bench in appropriate proceedings whether in the form of writ petition or Reference made by the learned Single Judge of this Court, as the case may be. As and when such occasion arises, the issue can be answered on the basis of settled legal principles and including keeping in mind the exposition of *S.S. Rana's case (supra)* of the Apex Court concerning another Cooperative Bank constituted under the Himachal Pradesh State Cooperative Act.

(4) As regards the second part of the question as to whether a writ would lie against the stated Cooperative Banks, we hold that it is not appropriate to give a definite answer to this question. For, it would depend on several attending factors. Further, even if the said Banks were held to be not a State within the meaning of Article 12, the High Court in exercise of powers under Article 226 of the Constitution of India, can certainly issue a writ or order in the nature of writ even against any person or Authority, if the fact situation of the case so warrants. In other words, writ can lie even against a Corporative Society. Whether the same should be issued by the High Court would depend on the facts of each case."

47. In response to the second part of the question, discussion made by the Full Bench is as under:

"12. That takes us to the second part of the question formulated by the Division Bench, as to whether a writ would lie against the stated Cooperative Banks? This question, essentially, touches upon the scope of power of the High Courts to issue certain writs as predicated in Article 226 of the Constitution of India. This is completely independent issue. In a given case, in spite of the opinion recorded by the Court that the respondent concerned in a writ petition, filed

under Article 226 of the Constitution of India, is not a State within the meaning of Article 12 of the Constitution of India. Even then, the High Court can exercise jurisdiction over such respondent in view of the expansive width of Article 226 of the Constitution of India. It is well established position that the power of the High Courts under Article 226 is as wide as the amplitude of the language used therein, which can affect any person – even a private individual – and be available for any other purpose – even one for which another remedy may exist (*Rohtas Industries Ltd. and another vs. Rohtas Industries Staff Union and others,* (1976) 2 SCC 82). In the case of *Engineering Mazdoor Sabha and another vs. Hind Cycles Ltd.,* AIR 1963 SC 874, the Court opined that even if the Arbitrator appointed under Section 10-A is not a Tribunal for the purpose of Article 136 of the Constitution in a proper case, a writ may lie against his Award under Article 226 of the Constitution. In the case of *Praga Tools Corporation vs. C.A. Imanual and others*, (1969) 1 SCC 585, the Apex Court held that it was not necessary that the person or the Authority on whom the statutory duty is imposed need be a public official or an official body. That a mandamus can be issued even to an official or a Society to compel him to carry out the terms of the statute under or by which the Society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorizing their undertakings. Further, a mandamus would lie against a Company constituted by a statute for the purposes of fulfilling public responsibilities. In the same decision, the Apex Court examined the amplitude of the term "Authority" used in Article 226 of the Constitution. The Court opined that it must receive liberal meaning unlike the term in Article 12 of the Constitution. It went to observe that the words "any person or authority" used in Article 226 cannot be confined only to statutory authorities and instrumentalities of the State. It may cover any other person or body performing public duty irrespective of the form of the body concerned. It is emphasized that what is relevant for exercising power is the nature of the duty imposed on the body which must be a positive obligation owned by the person or Authority. Depending on that finding, the Court may invoke its authority to issue writ of mandamus. In the case of *Life Insurance Corporation of India vs. Escorts Ltd. and others,* (1986) 1 SCC 264, the Constitution Bench opined that the question must be "decided in each case" with reference to particular action, the activity in which the State or the instrumentality of the State is enacted when performing the action, the public law or private law, character of the Constitution and most of the other relevant circumstances. In a given case, it may be possible to issue writ of mandamus for enforcement of public duty which need not necessarily to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract, as noted by Professor de Smith, which exposition has found favour with the Apex Court.

13. The Apex Court after referring to catena of decisions and authorities in the case of *UP State Cooperative Land Development Bank Ltd. Vs. Chandra Bhan Dubey and others,* (1999) 1 SCC 741, has succinctly delineated the scope of

> authority under Article 226 of the Constitution. In para 27 of this decision, the Court opined that Article 226 while empowering the High Court for issue of orders or direction to any Authority or person does not make any difference between public functions or private functions, but did not go to elaborate that question in the fact situation of that case. It is unnecessary to multiply the authorities on the point except to observe that a writ would lie against even a Cooperative Society or Company. But that does not mean that the Court is bound to issue such a writ. It is the prerogative of the High Court to issue writ to any person or authority, which is not a State or an instrumentality of the State. The Court would do so with circumspection and keeping in mind the well defined parameters. Whether in the fact situation of a given case, the Court ought to exercise its authority to issue writ or order in the nature of writ under Article 226 of the Constitution, will have to be answered on the basis of the settled principles, on case to case basis. Thus, it will be inapposite to put it in a straight jacket manner that every writ petition filed against the Cooperative Banks must be dismissed as not maintainable or otherwise."

48. A Division Bench of this Court in ***Sanjeev Kumar's*** case, after considering the case law, including ***C.K. Malhotra's*** and ***Vikram Chauhan's*** cases, had held that since the relief in the petition was primarily claimed against the Cooperative Bank, therefore, petition itself is not maintainable and accordingly the petition was dismissed.

49. In ***C.K. Malhotra's*** case, it has been categorically held in Para-95 that the power, which was exercised by the Registrar, was under various service regulations framed by the Societies under the respective bye-laws by virtue of Rule 9(j) of Rules 1971 and was not a statutory power exercised by the Registrar under the provisions of the Act and Rules. By relying upon judgments of the Apex Court, it was observed that since the bye-laws had no force of law, the service regulations had also no force of law and it was categorically observed that no doubt the orders under challenge were passed by the Registrar, exercising his power under the service regulations but not under any Statute or Rules.

50. Judgment passed by the Apex Court in ***Nayagarh Co-operative Central Bank v. Narayan Rath & another,*** **(1977) 3 SCC 576,** whereby maintainability of writ petition against Cooperative Society was upheld by the Apex Court, was distinguished in ***C.K. Malhotra's*** case, on the ground that the order under challenge in that case, which had been passed by the Registrar in ***Nayagarh Co-operative Central Bank's*** case, was passed in exercise of his statutory authority, in the purported exercise of powers conferred on him, whereas in ***C.K. Malhotra's*** case and other connected matters, Registrar had not passed the impugned orders acting as statutory authority in the purported exercise of power conferred upon him by the Act or the rules framed thereunder, but by virtue of having been named as an authority to hear and decide appeals under service regulations framed under the bye-laws,

which were having no force of law and, therefore, exercise of power by the Registrar was not statutory in nature but an exercise of power under the bye-laws.

51. In ***S.S. Rana's*** case also, the Supreme Court has quoted instances when Courts, including Supreme Court, have upheld the maintainability of a writ petition against Cooperative Society, by referring the decisions of Supreme Court in cases (i) ***Gayatri De vs. Mousumi Cooperative Housing Society Ltd. & Ors.*****, (2004) 5 SCC 90**, wherein the Supreme Court had upheld the maintainability of the writ petition against a society, as its administration and affairs were being managed by a Special Officer appointed by the High Court to discharge the functions of the society and, thus, he was regarded as a public authority; and (ii) in ***Nayagarh Cooperative Central Bank Ltd. & Anr. vs. Narayan Rath & Anr.*****, (1977) 3 SCC 576**, wherein the Court had held the writ to be maintainable for the reason that the order, under challenge, was passed by the Registrar, acting as a statutory authority in the purported exercise of power conferred upon him by the Act; and (iiii) and also in decisions of High Courts, like ***Bholanath Roy & Ors. vs. State of West Bengal & Ors.,*** **(1996) Vol.1 Calcutta Law Journal 502,** wherein writ petitions have been held to be maintainable against a society if it is demonstrated that any mandatory provisions of the Act or the Rules framed therein have been violated by it**.**

52. In ***A. Umarani v. Ragistrar, Cooperative Societies and others,*** **(2004) 7 SCC 112** also, the Apex Court has held that where an action of Cooperative Society is violative of mandatory provisions, writ petition would be maintainable.

53. In ***Vikram Chauhan's*** case also, Full Bench of this Court has held that in the given facts and circumstances of the case, if the fact situation of the case so warrants, writ can lie even against a Cooperative Society and it would depend upon the facts of each case.

54. In ***Sanjeev Kumar's*** case, in the given facts and circumstances, it was not considered appropriate by the Division Bench to entertain the writ petition against Cooperative Bank. Maintainability of present writ petitions is to be considered on the basis of given facts of these cases.

55. As also reiterated by the Division Bench in ***Sanjeev Kumar's*** case, after referring pronouncements of the Apex Court, it is settled law that it is neither desirable nor permissible to pick out a word or sentence from the judgment, divorced from the question under consideration and treat it to be a complete law declared by the Court and the judgment must be read as a whole and the observations from the judgment have to be considered in the light of questions which were before the Court and a decision takes its colour from the question involved in the case in which it is rendered and while applying the decision to a later case, the Court must carefully try to ascertain true principle laid down by the decision of the Court and

not to pick out words or sentences from the judgment, divorced from the context of the question under consideration by the Court to support their reasoning and likewise it is also to be born in mind that observations in the judgment cannot be read like a text of a statute nor out of context.

56. Learned counsel for the Cooperative Bank, referring judgment in ***Thalappalam Service Cooperative Bank Limited and others v. State of Kerala and others,*** **(2013) 16 SCC 82**, has contended that Cooperative Bank is neither State nor instrumentality of the State, within the meaning of Article 12 of the Constitution of India and Cooperative Society has also not been found public authority by the Apex Court for the purpose of Right to Information Act and, therefore, also these petitions are not maintainable.

57. As discussed hereinafter, even if an institution does not fall within the expression "State" or "instrumentality of State", within the meaning of Article 12 of the Constitution of India, then also for appropriate given facts and circumstances such institution can be subjected to the jurisdiction of the High Court under Article 226 of the Constitution. An institution, which is not covered under public authority for the purpose of Right to Information Act, can be subjected to jurisdiction of High Court under Article 226 of the Constitution in an appropriate case.

58. Article 226 of the Constitution empowers the High Court to issue direction, orders or writs or any of it, for enforcing of rights conferred by Part-III and for any other purpose not only to the State or its functionaries but to any other person also. Therefore, in given facts and circumstances, power under Article 226 can be exercised against a private person also, including natural as well as juristic person. Needless to refer to an example of Writ of Habeas Corpus, which, so many times, may warrant issuance of writ against a private person to produce or to let free a person from illegal detention.

59. In present case, admittedly, Cooperative Bank is not an authority or instrumentality of the State under Article 12 of the Constitution. Its status is like a private person.

60. In ***Anadi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and others*** versus ***V.R. Rudani and others,*** **(1989) 2 SCC 691**, discussing the scope of Article 226 of the Constitution, the Supreme Court has held as under:

> "19. The scope of this Article has been explained by Subba Rao, J. in *Dwarkanath v. I.T.O.,* (1965) 3 SCR 536:
>
> > "This Article is couched in comprehensive phraseology and it ex-facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the

> person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression 'nature', for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders, or writs other than the prerogative writs. It enables the High Court to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Art. 226 of the Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself."

20. The term "authority" used in Article 226, in the context must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied.

21. In *Praga Tools Corporation v. C. A. Imanual*, (1969) 3 SCR 773 : (1969) 1 SCC 585, this Court said that a mandamus can issue against a person or body to carry out the duties placed on them by the statutes even though they are not public officials or statutory body. It was observed:

> "It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also, to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purpose of fulfilling public responsibilities (Cf. Halsbury's Laws of England, 3rd Edn., Vol. II. p. 52 and onwards.)"

> 22. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states (Judicial Review of Administrative Action, 4th Edn, page : 540) : "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available "to reach injustice wherever it is found". Technicalities should not come in the way of granting that relief under Art. 226. We, therefore reject the contention urged for the appellants on the maintainability of the writ petition."

61. Earlier also, this Court vide judgment dated 20.3.2017, passed in **CWP No.8724 of 2018,** titled ***Surjeet Kaur v. State of Himachal Pradesh and others***, after considering judgments of the Supreme Court, passed in ***Binny Limited and another v. V. Sadasivan and others with D.S. Veer Ranji v. Ciba Specialty Chemcial (I) and another,*** reported in **(2005) 6 SCC 657; *K.K. Saksena v. International Commission on Irrigation & Drainage and others,*** reported in **(2015) 4 SCC 670;** and that of Kerala High Court in ***Mrs. Sobha George Adolfus V.State of Kerala,*** **AIR 2016 Kerala 175,** has held that in view of ratio of law laid down by Apex court, it is clear that writ of mandamus can be issue against a private person/institution in the given facts and circumstances of the case where the said person/Institution is discharging public duty or positive obligation of public nature or is under liability to discharge any function under any statute; to compel it to perform such statutory function**.**

62. Registrar, with respect to Cooperative Society, performs two types of functions, acting in dual capacity. Some powers are conferred upon him by the statute and rules framed thereunder, whereas others by nominating him as an Authority or Officer to perform the functions under the regulations/bye-laws as framed by the Society.

63. Exercise of statutory power and performing a statutory function by Registrar is definitely amenable to writ jurisdiction of this Court. But as held in ***C.K. Malhotra's*** case and judgments passed by the Apex Court and other subsequent judgments passed by this High Court, referred supra, exercise of power by the Registrar, under bye-laws and regulations framed thereunder by the Society itself, but not having statutory force, is not amenable to writ jurisdiction.

64. In view of the above discussion, I am of the considered view that mandate of ***C.K. Malhotra's, S.S. Rana's, Vikram Chauhan's*** and ***Sanjeev Kumar's*** cases is not that High Court has no jurisdiction to exercise power under Article 226 of the Constitution of India

against a Society or Registrar while dealing with the matters pertaining to the Society. Even in the judgments of the Apex Court, referred supra, there is clear mandate that in given facts and circumstances, writ is maintainable not only against the State of its functionaries within meaning of Article 12 of Constitution but even against private person, including natural as well as juristic person and thus a writ petition against a Society may or may not be maintainable, depending upon facts and circumstances of the case, however, undoubtedly a writ petition is maintainable against the orders passed by the Registrar with respect to functioning of the Society, exercising statutory powers under the Act or Rules framed thereunder.

65. It would be apt to reiterate that the Courts have been established to do substantial justice and it is cardinal principle of jurisprudence that being justice imparting institutions, Courts should adopt approach oriented to do justice instead of to be too technical for rejecting the case on the basis of faulty, incomplete or imperfect pleading and wherever possible it should go beyond that to understand the grievance of the litigant and should try to redress the same within the framework of law and Constitutional mandate, because style and manner of elaborating and explaining the cause or grievance of a litigant, as understood by the Advocate, always vary from person to person and also for lapse on the part of litigant to describe his grievance in proper manner, indicating appropriate cause of grievance. The Courts should not behave like an artificial intelligence machine but should adopt justice oriented approach.

66. To substantiate aforesaid view, I draw support from the judgment cited by the Mr. B.C. Negi, Senior Advocate, passed by the Supreme Court in ***Prabodh Verma and others v. State of Uttar Pradesh and others*, (1984) 4 SCC 251,** relevant paras whereof read as under:

> "50 To summarize our conclusions:
>
> .....
>
> (5) Though a High Court ought not to dismiss a writ petition on a mere technicality or because a proper relief has not been asked for, it should not, therefore, condone every kind of laxity, particularly where the petitioner is representated by an advocate.
>
> .....
>
> 51. For the reasons mentioned above, we allow these appeals. reverse the judgments appealed against and set aside the orders under appeal, and allow these writ petitions and make the rule issued in each of them absolute. We overrule the judgment of the Allahabad High Court in the case, of *Uttar Pradesh Madhyamik Shikshak Sangh v. State of Uttar Pradesh*, 1979 All LJ 178 and in these appeals and writ petitions we pass further orders as follows':

.....

4. This direction will apply to those reserve pool teachers whose services were, terminated and who had not filed any Writ petition or who, had filed a writ petition but had not succeeded in obtaining a stay order, and to those reserve pool teachers who had not been appointed in view of the interim orders passed by the High Court and thereafter by reason of the judgment of the High Court in the *Sangh's* case and who have not filed any writ petition.

52. Before we part with these appeals and writ petitions we would like to mention that in some of these writ petitions the only relief claimed is in general and vague terms. We reproduce that prayer., retaining its errors of grammar and syntax. That prayer is as follows :

> "It is, therefore, prayed that this Hon'ble Court be pleased, to issue such writ, order or directions for the enforcement of the fundamental rights of the petitioner as are deemed fit and reasonable by this Hon'ble Court and to grant such other relief to the petitioner as is deemed fit and reasonable for the redress of their grievance".

In the light of what we have said above about the defective prayer in the writ petition filed by the Sangh in the Allahabad High Court, we ought to insist upon these petitioners setting their house in order by amending the prayer clause and asking for proper reliefs. These petitions are drafted by advocates. It is true that these petitioners are poor and it must not have been possible for them to pay substantial fees to their advocates but that cannot be a reason for an advocate who undertakes a client's case not to give of his best to his client. An advocate should not measure the quality of work he will put into a case by the quantum of fees he receives. Our insisting upon these petitions being so amended would, however, involve delay and as some of these petitioners are reserve pool teachers who were not appointed by reason of the interim orders passed by the Allahabad High Court and the judgment of that High Court in the *Sangh's* case, it would result in further hardship to them by delaying their employment. We have therefore, not insisted upon these writ petitions being so amended but passed in these writ petitions also, the order set out above."

67. Facts emerged on surface, on consideration of material placed before me and submissions made by learned counsel for the parties, are that in Himachal Pradesh, there are three Cooperative Banks, registered as Cooperative Societies, under the Act, namely H.P. State Cooperative Bank (HPSCB), KCCB and JCCB. These banks are having area of jurisdiction in different and distinct Districts, without overlapping the jurisdiction of each other. HPSC Bank is having jurisdiction in Districts Shimla, Mandi, Bilaspur, Sirmour, Kinnaur and Chamba; whereas KCCB has jurisdiction in Districts Kangra, Lauhal & Spiti, Hamirpur, Una and Kullu; and JCC Bank has its jurisdiction in District Solan only. These banks are performing identical

functions and to avoid overlapping they have been permitted to function in different and distinct areas.

68. Rules 1971 framed, under the Act, by the State of Himachal Pradesh, applicable to all societies registered under the Act, are statutory in nature and Rule 56 thereof reads as under:

> **"56. Officers and employees of Co-operative Societies–**
>
> (1) Notwithstanding anything contained in the bye-laws of a society, no Co-operative Society shall appoint any person as its paid officer or employee in any category of service unless he possesses the qualifications and furnishes the security, if so specified by the Registrar, from time to time, for such category of service in the society, or for the class of society to which it belongs. The conditions of service of the employees of the societies shall be specified by the Registrar.
>
> (2) No Co-operative Society shall retain in service any paid officer or employee, if he does not acquire the qualifications or furnish the security as is referred to in sub-rule (1) within such time as the Registrar may direct.
>
> (3) No Primary society shall employ a salaried officer or servant with total monthly emolument exceeding rupees five thousand and no secondary or apex society shall employ a salaried officer or servant with total monthly emoluments exceeding rupees eight thousand without the prior permission of the Registrar.
>
> Provided that promotion of any employee to a higher post shall be construed as appointment under this sub-rule:
>
> Provided further that if operating expenses of a co-operative society, excluding the amount of depreciation exceeds its income in a financial year, such society shall not employ any salaried officer or servant in the next succeeding financial year without the prior permission of the Registrar;
>
> Provided further that no co-operative society shall employ salaried officer or servant exceeding the cadre strength, if any, fixed by the Registrar by a special or general order, and shall not fill more than ten vacancies in a financial year under this sub-rule without prior permission of the Registrar.
>
> (4) The Registrar may for special reasons to be recorded in writing relax in respect of any paid officer or employee, the provisions of this rule in regard to the qualifications he should possess or the security he should furnish.
>
> (5) Where, in the course of an audit under section 61, or an inspection under section 65 or inspection under section 66, or inquiry under section 67, it is brought to the notice of the Registrar that the paid officer or servant of a

society had committed, or has been otherwise responsible for mis-appropriation, breach of trust or other offence, in relation to the society, or has willfully neglected or failed to discharge his duties and functions as enjoined on him under the Act, rules or bye-laws or is otherwise responsible for any act or omission thereby adversely affecting the interest of the society, the Registrar may if in his opinion, there is prima facie evidence against such paid officer, or servant, and suspension of such paid officer or servant is necessary in the interest of the society, direct the committee of the society, pending the investigation and disposal of the matter, as the case may be, to place or cause to be placed such paid officer or servant under suspension from such date and for such period as may be specified by him."

"Provided that an officer/servant of the society shall be deemed to have been placed under suspension by an order of the competent Authority or the Registrar in the following circumstances :-

(a) If he is detained in custody, whether on a criminal charge or otherwise, for a period exceeding forty-eight hours;

(b) If in the event of a conviction for an offence, he is sentenced to a term of imprisonment exceeding forty-eight hours.

If a servant of the society who has been detained for a period exceeding forty-eight hours is later on released on bail, such release will not affect the deemed suspension which will continue to be in force until revoked by the competent authority or the Registrar."

(6) On receipt of a direction from the Registrar under sub-rule (5), the committee of society shall, notwithstanding any provision to the contrary in the bye-laws, place or cause to be placed the paid officer or servant under suspension forthwith.

(7) If the committee fails to comply with the direction issued under sub-rule (5), the Registrar may make an order placing such paid officer or servant under suspension from such date and for such period as he may specify in the order and thereupon the paid officer or servant, as the case may be, shall be under suspension.

(8) The officer or servant suspended under this rule shall be reinstated only after the previous approval of the Registrar**."**

69. Rule 56(1) not only confers power but also enjoins duty upon the Registrar to specify conditions of service of the employees of the Societies and this Rule, starting with non-abstante clause, provides that notwithstanding anything contained in bye-laws of a society, no Co-operative Society shall appoint any person as its paid officer or employee in any category of

service unless he possesses the qualifications and furnishes the security, if so specified by the Registrar, from time to time, for such category of service in the society, or for the class of society to which it belongs. Last portion of it makes it clear that it is mandatory for the Registrar to specify the conditions of service by using the term "conditions of service of employees of the societies 'shall' be specified by the Registrar".

70. Conferment of power upon the Society to make bye-laws in respect of appointment, suspension and removal of the members of Society under Rule 9(j) of Rules 1971 does not affect statutory duty, statutory power and duty of Registrar devolved upon him under Rule 56 of Rules 1971. Proceedings under the Rules/Bye-laws framed by the Society and nomination of Registrar as a appellate/ appropriate Authority therein, for a class of employees or all employees, is altogether different than the duty cast upon the Registrar under Rule 56 of Rules 1971. Therefore, decision of the Registrar, performing his duty as an appellate Authority or in any other capacity, for his nomination as such, under the Rules/Bye-laws framed by the Society, may not be a statutory function performed by him, but so far as the duty to prescribe conditions of service is concerned, it is a statutory duty conferred upon him under Rule 56 of Rules 1971. Any rule or clause framed by the Society under Rule 9, reasserting the duty conferred upon the Registrar under statutory Rules shall not change the nature of the statutory functions to be performed by him under the Act and/or the Rules, rather it would be supplementing provision of power conferred or duty cast upon the Registrar under the Statute and/or statutory Rules.

71. Registrar, being a statutory authority and functionary of the State, performing his statutory function under Rule 56 of Rules 1971, is expected to specify conditions of service of employees of the societies in consonance with provisions of Articles 14, 15 & 16 of the Constitution of India and for this reason only for recruitment and promotion of employees of the Cooperative Bank, reservation roster notified by the State under Articles 15 and 16 has also been made applicable. Any decision on the part of the Registrar with respect to specifying conditions of service of the employees must pass the test of Articles 14, 15 and 16, contained in Part-III of the Constitution of India.

72. Fundamental Rights, contained in Part-III of the Constitution of India, are legally enforceable. Therefore, it is a legal right of employees of the Societies to have service conditions specified by the Registrar, exercising the power under rule 56 of Rules 1971, in consonance with the provisions of aforesaid Articles and to have similar treatment, like the similarly situated employees of, if not identical but similar, societies, under Equality clause of Article 14. Any arbitrary decision or specification of service conditions would definitely be in violation of Article 14, as arbitrariness is anti-thesis of Equality clause contained therein and in

such an eventuality the employee(s) of a society, for omission or commission on the part of Registrar, would have a legal right to enforce against the action or inaction of the Registrar, as the Registrar is legally bound to perform the duty of specifying the conditions of service of employees of the societies, by framing such rules where 'equals are treated equally'.

73. Petitioners herein are undergraduates, who are serving as Grade-IV Officers. None of them, except petitioners in CWPs No.972 & 977 of 2017, fulfills the existing eligibility criteria for promotion and appointment as Grade-III. However, petitioners in CWPs No.972 & 977 of 2017 have also been denied promotion for acquiring requisite qualification, i.e. Diploma in Cooperation without permission of competent authority. Eligibility criteria for appointment as Grade-III Officer is as under:

		For Direct Recruitment		**For Promotion**
Grade-III	(i)	A second class degree of a recognized University in case of candidates possessing banking experience of 3 years simple graduate may also apply.	(i)	A degree of a recognised University or Part-I of CAIIB or JAIIB or Diploma in Cooperation/ Banking.
	(ii)	Also a pass in shorthand and type writing from a recognized institute (in case of PA to MD)	(ii)	Minimum 3 years service as an Office Asstt. or 5 years experience as Cashier/Field Asstt./Steno-typist/ Typist/ Godown Keepers.

74. Grade-IV Officers/officials having a degree from recognized University, with three years service as Office Assistant or five years experience as Cashier/Assistant/ Steno-typist/Typist/Godown Keeper, are entitled for promotion to Grade-III. Those who are not having a degree would be eligible for promotion, for having Part-I of CAIIB or JAIIB or Diploma in Cooperation/Banking, apart from the minimum length of service prescribed under Clause (ii) of Rule reproduced supra.

75. Private respondents herein are respondents No.4 to 26, who are graduate Grade-III Officers, but were not eligible to be promoted at the time of filing of the wit petitions, but have acquired such qualification on completion of prescribed length of service in March, 2020, had been arrayed as respondents, on their application, in CWP No.2068 of 2017. Proposed respondents No.23 to 39 (CWP No.2001 of 2015) are also similarly situated persons.

76. Till 2008, the Cooperative Bank was also permitting its Officers/officials to undergo Higher Diploma in Cooperative Management (C) from RICM, Chandigarh, but for sponsoring names for the said Higher Diploma no proper mechanism was being adopted by the

Bank and by ignoring the seniority, junior Officers/officials were also being permitted to undergo said diploma as evident from Annexure P-4 (CWP No.2068 of 2017), Annexure P-7 (CWP No.2001 of 2015), whereby juniors to petitioners herein have been permitted to undergo RICM Diploma; and Annexure P-10 (CWP No.972 of 2017) and Annexure P-8 (CWP No.977 of 2017), whereby juniors of the petitioners were promoted to Grade-III. Sponsorship of juniors was objected by the petitioners and others by submitting a representation, Annexure P-5 (CWP No.2068 of 2017), to the Managing Director of Cooperative Bank.

77. It is an admitted fact that some Officers/officials of Cooperative Bank, without seeking permission, had acquired Higher Diploma at their own but prior to their seniors, and such Officers/officials were also considered by the Cooperative Bank to be eligible for further promotion and were promoted as such. However, vide General Circular No.137/2015-16, dated 28.12.2015, Annexure P-5 (CWPs No.972 & 977 of 2017), the Cooperative Bank had notified Resolution of Board of Directors of the Bank, whereby it was resolved that henceforth the Bank shall not sponsor any undergraduate to acquire HDC/HDCM and, therefore, request of such employees of the Bank for doing Higher Diploma in Cooperation (HDC/HDCM) course would not be entertained. However, as a matter of fact, thereafter also some undergraduate Officers/officials had acquired above referred Diploma of their own and were considered for promotion, as evident from Head Office Order No.48/2014, dated 13.2.2014, Annexure P-3 (CWPs No.972 and 977 of 2017), whereby two such persons, namely Dharam Dass and Subhash Chand, who had completed HDC/HDCM, without sponsorship of the Bank, were promoted as Grade-III Officers/Assistant Managers. Thereafter also, the Cooperative Bank had made promotions of such persons who had acquired Higher Diploma without permission, as evident from Head Office Order No.400/2016-17, dated 24.3.2017, Annexure P-10 (CWP No.972 of 2017), wherein at least one such person, namely Rajinder Singh, who had acquired higher qualification without permission, was promoted from the post of Assistant Manager (Grade-III) to the post of Manager (Grade-II).

78. Such Officers, who had acquired aforesaid Diploma at their own were not considered in like manner as in case of petitioners in CWPs No.972 and 977 of 2017, they had applied for permission for higher status, i.e. Higher Diploma, vide applications dated 8.7.2014 and 10.7.2014 Annexure P-6 (CWPs No.972 & 977 of 2017), which were forwarded to General Manager, Head Office, through proper channel, but neither permission was granted nor refused and in the meanwhile they had acquired Higher Diploma, but instead of extending benefit to them of the said qualification, like other similarly situated persons, referred supra, particularly in Annexure P-3 (CWPs No.972 & 977 of 2017), they were issued Show Cause Notice dated

17.11.2015 (Annexure P-2 in CWP No.972 of 2017) and 11.12.2015 (Annexure P-2 in CWP No.977 of 2017), to show cause as to why disciplinary action be not initiated against them.

79. It is also an admitted fact that as of now Cooperative Bank is not sponsoring its employees for acquiring Higher Diploma/qualification, which is an essential qualification for undergraduates to become eligible for promotion to the higher post.

80. In the aforesaid circumstances, petitioners in CWPs No.972 and 977 of 2017 have approached this Court, seeking direction to the respondent, i.e. State of Himachal Pradesh through Secretary (Cooperation), and Registrar of the Cooperative Societies to consider their case for promotion to the post of Assistant Manager (Grade-III) from the post of Executive Assistant, from the date of acquiring diploma, i.e. Higher Diploma Programme in Cooperative Management.

81. Petitioners in CWP No.2001 of 2015 have also approached this Court in March, 2015, on the ground that as per practice prevalent in the Cooperative Bank, candidates belonging to Grade-IV category were promoted to the next higher Grade, on the basis of educational qualification of Matriculation and thereafter it was made a condition precedent for undergraduates to have qualification of Higher Diploma subsequent thereto for being considered for regular promotion for next higher category. But, earlier the Cooperative Bank was sending candidates for training on the basis of seniority in Grade-IV cadre, however, in the meanwhile, the Bank started sending candidates to training without following criteria of seniority against which the petitioners had represented but no reply to that representation was given. Thereafter, petitioners had represented to the competent authority to sponsor their names for training for Higher Diploma to make them eligible for promotion, but neither permission was granted to the petitioners nor any method was adopted by the Bank to regulate the training for Higher Diploma, despite issuance of General Circular No.83/2006, dated 24.8.2006 Annexure P-3, whereby it was circulated that the Officers/officials of the Bank, doing Higher Diploma from RICM, Chandigarh, at their own, without seeking permission, shall not be considered for further promotion, but the fact remains that a number of such persons were considered for promotion and promoted accordingly. Therefore, petitioners have approached the Court for declaring them entitled for promotion to Grade-III category and to consider them for promotion to the next higher post and thereafter permit them to undergo Higher Diploma course.

82. In aforesaid circumstances, on 3.6.2016, Board of Directors of Cooperative Bank has proposed suitable amendment in Bank Service Rules providing promotion to undergraduate Grade-IV Officers/officials to Grade-III post on the basis of length of service only but with Diploma. The said proposal was not accepted by the Registrar.

83. Thereafter, the Bank's Employees Union had again represented to the Management that about 100 posts of Assistant Managers were vacant in the Bank and available graduate incumbents in the feeder cadre were not possessing three years required service experience on feeder post and, therefore, request was made to fill these posts on ad hoc basis by promoting undergraduates conditionally and sponsoring them to acquire Diploma in Cooperation Management from Cooperative Training Centre, Mashobra, District Shimla or Garli, District Kangra, Himachal Pradesh subsequently and in case they failed to qualify the said Diploma revert them back and it was noticed by the Bank that there were 39 Executive Assistants (Grade-IV), who had served for 20 years or more than that; 38 Executive Assistants were having length of service of 15-20 years: and 47 were having length of service of 10-15 years.

84. In this backdrop, Board of Directors of the Cooperative Bank, vide Resolution dated 17.4.2017 Annexure P-7 (CWP No.2068 of 2017), had again referred the case for amendment/ addition in the Bank Service Rules for allowing one time promotion to undergraduates stagnated on the posts of Executive Assistants (erstwhile Grade-IV) for years together and it was proposed as under:

"Appendix-I(g) Gr.III (Assistant Manager, changed nomenclature of post) of Rule No.5 of HPSCB Employees Terms of Employment and Working Conditions) Rules, 1979:

Existing provisions for promotion	**Amendment/addition proposed for promotion.**
i) A degree of a recognized University or Part-1 of CAIIB or Diploma on Cooperation/ Banking. ii) Minimum 3 years service as an Office Assistant or 5 years experience as Cashier/Field Assistant/Steno Typist/Typist/ Godown Keeper.	i) A degree of a recognized University or Part of CAIIB or Diploma on Cooperation/Banking. ii) Minimum 3 years service as an Office Assistant or 5 years experience as cashier/Field Assistant/Steno-Typist/ Typist OR Matriculation with 20 years regular service in feeder category i.e. as Jr. Clerk/Office Assistant/ Steno-Typist/Typist. **Note: -** promotion of Matriculates shall be subject to availability of vacancies on the date of routine DPC subsequent

	to completion of 20 years of service in the feeder category.

85. In view of the aforesaid proposal, this Court, vide order dated 30.5.2017, pending consideration of CWP No.2001 of 2015, had directed the Registrar to decide the issue, which was referred to him by Cooperative Bank, after hearing one of the representation of the petitioners as also representations of respondents No.4 to 22, on or before the next date of hearing.

86. In response to the proposal of the Cooperative Bank and in compliance of the order dated 30.5.2017, passed by this Court, Registrar had considered the issue and, after giving opportunity of hearing, had rejected the proposal of the Cooperative Bank, vide order dated 15.6.2017, which led to amendment in CWP No.2001 of 2015 and filing of CWP No.2068 of 2017, assailing the order passed by the Registrar.

87. During hearing, on some dates, learned Advocate General has submitted that the petitioners are not having any legal right to seek relaxation in Rules as relaxation cannot be claimed as a matter of right and there is no corresponding legal duty assigned to the Registrar to grant relaxation to the petitioners as a matter of their right and, therefore, for absence of any legal right and corresponding legal duty, this Court is precluded from issuance of Mandamus to the concerned authority to accept the prayer of the petitioners as well as Bank.

88. In support of his contention, learned Advocate General has cited ***State of U.P. and others v. Harish Chandra and others,*** **(1996) 9 SCC 309** (referred Para-10)**;** ***Oriental Bank of Commerce v. Sunder Lal Jain and another,*** **(2008) 2 SCC 280** (referred Para-11)**;** and ***Union of India and others v. Muralidhara Menon and another,*** **(2009) 9 SCC 304** (referred Paras 13 & 15)**.**

89. The Apex Court in ***Harish Chandra's*** case, in Para-10, has held as under:

> "10. .....Under the Constitution a mandamus can be issued by the Court when the applicant establishes that he has a legal right to performance of legal duty by the party against whom the mandamus is sought and said right was subsisting on the date of the petition. The duty that may be enjoined by mandamus may be one imposed by the Constitution or a Statute or by Rules or orders having the force of law. But no mandamus can be issued to direct the Government to refrain from enforcing the provisions of law or to do something which is contrary to law....."

90. In ***Sunder Lal Jain's*** case, the Supreme Court has held as under:

> "11. The principles on which a writ of mandamus can be issued have been stated as under in "The Law of Extraordinary Legal Remedies" by F.G. Ferris and F.G. Ferris, Jr. :

"Note 187-- Mandamus, at common law, is a highly prerogative writ, usually issuing out of the highest court of general jurisdiction, in the name of the sovereignty, directed to any natural person, corporation or inferior court within the jurisdiction, requiring them to do some particular thing therein specified, and which appertains to their office or duty. Generally speaking, it may be said that mandamus is a summary writ, issuing from the proper court, commanding the official or board to which it is addressed to perform some specific legal duly to which the party applying for the writ is entitled of legal right to have performed.

Note 192 -- Mandamus is, subject to the exercise of a sound judicial discretion, the appropriate remedy to enforce a plain, positive, specific and ministerial duty presently existing and imposed by law upon officers and others who refuse or neglect to perform such duty, when there is no other adequate and specific legal remedy and without which there would be a failure of justice. The chief function of the writ is to compel the performance of public duties prescribed by statute, and to keep subordinate and inferior bodies and Tribunals exercising public functions within their jurisdictions. It is not necessary, however, that the duty be imposed by statute; mandamus lies as well for the enforcement of a common law duty.

Note 196 -- Mandamus is not a writ of right. Its issuance unquestionably lies in the sound judicial discretion of the Court, subject always to the well-settled principles which have been established by the Courts. An action in mandamus is not governed by the principles of ordinary litigation where the matters alleged on one side and not denied on the other are taken as true, and Judgment pronounced thereon as of course. While mandamus is classed as a legal remedy, its issuance is largely controlled by equitable principles. Before granting the writ the Court may, and should, look to the larger public interest which may be concerned - an interest which private litigants are apt to over-look when striving for private ends. The Court should act in view of all the existing facts, and with due regard to the consequences which will result. It is in every case a discretion dependent upon all the surrounding facts and circumstances.

Note 206.--..... The correct rule is that mandamus will not lie where the duty is clearly discretionary and the party upon whom the duty rests has exercised his discretion reasonably and within his jurisdiction, that is, upon facts sufficient to support his action.""

91. In ***Muralidhara Menon's*** case, the Apex Court has held as under:

> "13. Article 14 of the Constitution of India providing for the equality clause is a positive concept in terms whereof, the equals, subject to certain exceptions, are to be treated equally and unequals cannot be treated equally. If a relaxation has been granted in case of one employee on the basis of the materials available before the Board, the same by itself may not be treated to be a binding precedent so as to enable the Tribunal or High Court to issue a writ of or in the nature of mandamus."
>
> .....
>
> "15. A writ of mandamus can be issued, provided there exists a legal right in the applicant and a corresponding legal duty in the respondent. Even otherwise a Superior Court having a limited jurisdiction in this behalf would not interfere with the discretionary jurisdiction exercised by the statutory authorities unless a clear case for interference is made out subject of course to just exceptions."

92. Learned counsel for the Cooperative Bank has referred pronouncements of the Apex Court in ***Keshav Chandra Joshi and others v. Union of India and others,*** **1992 Supp (1) SCC 272;** ***J&K Public Service Commission and others v. Dr. Narinder Mohan and others,*** **(1994) 2 SCC 630;** and ***State of Gujarat and others v. Arvindkumar T. Tiwari and another,*** **(2012) 9 SCC 545,** to advance the arguments that relaxation for appointment or promotion cannot be claimed as a matter of right and further that relaxation of essential eligibility criteria is not permissible under law and in absence of any power to relax the relevant rules, the competent authority is not having power to relax as is being sought on behalf of the petitioners.

93. Learned Advocate General has also referred to ***Muralidhara Menon's*** case, wherein it has been observed that relaxation granted in case of one employee, on the basis of material available before the authority, by itself is not to be treated a binding precedent so as to enable the Court to issue Mandamus extending the same to others.

94. Dr. Lalit Kumar Sharma, learned counsel for the private respondents as well as proposed respondents, by referring to ***Dr. Narinder Mohan's*** and ***Arvindkumar T. Tiwari's*** cases, has endorsed the aforesaid plea raised by learned Advocate General as well as learned counsel for Cooperative Bank. By citing ***R.R. Verm and others v. Union of India and others,*** **AIR 1980 SC 146 : (1980) 3 SCC 402,** he has submitted that the provisions of relaxation in rules are aimed at the public welfare and interest, and the interest to be served is always the public interest and not the individual interest and the public interest, in the matter of conditions of service of civil servant, is best served by rules, which are directed towards

efficiency and integrity. The learned counsel has further submitted that relaxation sought by the petitioners would definitely hamper the efficiency as none of them is a graduate.

95. So far as the case law cited by learned Advocate General, learned counsel for Cooperative Bank and learned counsel for private respondents/proposed respondents, and exposition of law therein is concerned, there is no doubt about it. There is no doubt about the ratio of law laid down by the Supreme Court in aforesaid judgments, with respect to right of relaxation in rules and power as well as object of granting relaxation in rules relating to conditions of service. However, arguments raised in this regard are misconceived and misdirected as, in present case, the proposal is not for 'relaxation of provisions in rules' but it is a proposal for amendment of rules and similar amendment has already been permitted by the Registrar in case of JCC Bank. The proposal is for not 'one time relaxation' but for providing 'one time opportunity' of promotion to the Matriculates and undergraduates to the post of Assistant Manager. Therefore, the case law in respect of issue of relaxation raised supra, is not relevant in present case.

96. In present case, as discussed supra, the Registrar is performing statutory duty devolved upon him under Rule 56 of statutory Rules with respect to specifying condition of service of employees of the Cooperative Bank. Therefore, he is under legal obligation to act in accordance with the constitutional mandate and the petitioners have a right to be treated alike with similarly situated persons who are equal to them and, therefore, as held in ***Harish Chandra's*** case, the duty may be enjoined by Mandamus which is imposed upon the concerned authority by the Constitution or Statute or by Rules or orders having the force of law.

97. Judgment in ***Muralidhara Menon's*** case is also of no help to the Registrar, rather it is favourable to the petitioners as they are asking for the treatment as has been given to their equivalents serving in identical cooperative Bank and further the petitioners herein are not asking for 'relaxation' but praying for according approval to the proposal of the Cooperative Bank for amendment in the Rules providing 'one time promotion' in their service career, that too, not to them only but all such similarly situated employees. Petitioners are not praying for personal relaxation for their promotion but seeking approval of amendment of Bank Rules by giving similar treatment as has been given to their counterparts serving in JCC Bank. Though Registrar has discretion to accept or reject the proposal of the Bank but he has a duty to act in accordance with the constitutional mandate and for reasons explained herein after and before he has failed to act accordingly.

98. In given facts of present cases, ingredients for issuance of mandamus, as reiterated by the Apex Court in ***Sunder Lal Jain's*** case supra are existing in present case.

99. During pendency of the petitions, it was also pointed out on behalf of the petitioners that the Registrar, exercising the power under Rule 56(1) of Rules 1971, vide communication dated 26.6.2007, had accorded approval to the amendment in the Rules framed by JCC Bank, under Rule 9(j) of Rules 1971, subscribing promotional avenues to the undergraduate Grade-IV Officers to the post of Grade-III on the basis of length of service and further that staffing pattern/organizational structure of Cooperative Bank and JCC Bank is identical in nature. Therefore, Registrar was directed to file affidavit in this regard, whereupon an affidavit dated 16.10.2019 has been filed by the Registrar wherein in Para-2, it is stated that an employee with graduation from recognized University, with five years experience in Grade-IV or Matriculate with ten years experience in Grade-IV, is eligible for promotion to Grade-III post.

100. With regard to staffing pattern of Cooperative Bank and JCC Bank, instructions dated September, 2019 have been placed on record on behalf of Registrar, which reflect that the pattern of staff working in the Banks is identical. It is also evident from explanation given by the Registrar in his affidavit dated 16.10.2019, wherein it is stated that as per Service Rules of the JCC Bank, post of Senior Manager/Senior Manager (IT) falls under the category of Grade-I; post of Manager/Manager(IT) in category of Grade-II; post of Assistant Manager/Assistant Manager(IT)/Legal Assistant falls under category of Grade-III; and post of Executive Assistant/Steno-Typist/Assistant/IT Assistant falls under category of Grade-IV and I find that in the staffing pattern of Cooperative Bank identical classification is there. The only difference is with respect to staff appointed by Cooperative Bank for running its Training Institute. As the JCC Bank is having the area of operation only in one District and is not having its own training Institute, such staff would not have been necessary to be appointed by the Bank, otherwise the organizational structure of the Cooperative Bank, with respect to Banking staff, apart from the number of posts, is identical to JCC Bank.

101. It has also been informed on behalf of the Cooperative Bank that at present against 345 sanctioned strength of Grade-III Officers, only 133 have been appointed and, as on 1.10.2019, 212 posts of Grade-III Officers were lying vacant. At that time, none of the Grade-IV Officers/ officials, graduate as well as undergraduate, was eligible to be appointed. As of now, private respondents are stated to have acquired eligibility for consideration for promotion, on completion of three years service as graduate Grade-IV official, in March, 2020. Even if all of them are promoted, then also considerable large number of posts shall remain vacant.

102. At the time of making prayer for vacation of stay order granted by the Court, it has also been submitted on behalf of the Cooperative Bank that in exigency of service and for smooth functioning of the Cooperative Bank, appointment/ promotion to these posts is required to be made on urgent basis.

103. The Registrar, vide order dated 15.6.2017, has rejected the proposal of the Cooperative Bank for amendment in the Rules proposed to provide one time promotional avenue to the undergraduate Grade-IV officials working in the Bank since long, on the grounds (i) that no justification qua an administrative exigency or shortage of staff in Grade-III cadre has been apprised by the Cooperative Bank and after rejection of earlier proposal, the Bank Management had again reconsidered the matter on the request of representatives of Bank's Employees Union and taken a decision to again take up the matter with the Registrar to approve the amendments in Rules; (ii) the argument to accord approval to the proposal of the Cooperative Bank, keeping in view the precedent of JCC Bank, was turned down, on the ground that staffing pattern and cadre strength of both Banks are different and further the Registrar had turned down such proposal of KCC Bank to relax Grade-IV officials of the Bank to exempt them from appearing in the test for further promotion to Grade-III post; (iii) and that proposal of the Bank was considered by him a vague proposal as it is a proposal to amend the Rules to afford one time opportunity of promotion to the matriculate Executive Assistants who are working in the Bank in the same cadre for the last 20 or more years due to lack of requisite educational qualification prescribed for promotion to the post of Assistant Manager and according to him, the proposal is vague as no such amendment in Rules can be carried out only to afford one time opportunity of promotion; and (iv) further that reasoning of stagnation on one post is also not genuine for the reason that three stagnation increments are available to the employees in lieu of promotion, after completion of 4-9-14 years of service in the same cadre.

104. It is true that after rejection of earlier proposal of the Bank, proposal, second time, was made after receiving representation from Bank's Employees Union but in the representation of the Union also reason for making such proposal was not only that undergraduate Grade-IV officials are not getting any chance of promotion but also, as evident from document placed on record (Annexure P-1), that at the time of making such demand/proposal, around 100 posts of Assistant Managers were lying vacant in the Bank and available graduate Grade-IV officials, i.e. in the feeder category of Grade-III, were not having three years required service experience, on the feeder post, and, thus, it was represented that undergraduate Grade-IV officials be promoted, on ad hoc basis, with condition to acquire the Diploma in Cooperation and Management from the concerned Cooperative Training Centre. Therefore, plea of the Registrar for rejecting the representation is contrary to the factual position. Even as of now, sufficient number of graduate Grade-IV officials, in the feeder category of Grade-III, are not available to be promoted to fill-up all posts available to be filled on promotion.

105. It has been informed that there are 345 posts in Cadre of Assistant Manager (Grade-III) and 259 of these posts are filled by promotion and remaining 86 posts are filled through direct recruitment. At present out of 345 posts, only 129 posts are filled, whereas remaining 216 posts are lying vacant. Serving 129 Grade-III Officers belong to two categories, i.e. 57 direct recruits and 72 promotees. Therefore, out of total 216 vacant posts, 187 posts are available to be filled by promotion from Grade-IV Officers and remaining 29 posts are to be filled through direct recruitment. It is also informed that at present as per existing Bank Service Rules, only 94 persons are eligible, for completing three years service as Grade-IV Officers, however, DPC has been held for 93 persons/candidates only and one post has been kept for the candidate against whom disciplinary action is pending. After promotion of these employees, 93 posts would still remain vacant, which are to be filled by promotion. It is also informed that at present there are 23 Grade-IV Officers who have completed 20 years service as such.

106. During pendency of writ petitions also, entire factual matrix has come in the knowledge of the parties and Registrar is also one of the parties in the petitions. Despite that, the Registrar has not bothered to consider the entire factual matrix when he was granted an opportunity by the Division Bench of this Court, vide order dated 4.12.2018, passed in CWP No.2068 of 2017 to impart instructions, particularly in view of judgment of the Apex Court in ***Hukum Chand Gupta v. Director General, Indian Council of Agricultural Research and others*, (2012) 12 SCC 666.** After reconsideration, he was having opportunity to rectify his mistake by taking note of all facts which have come to his notice during personal hearing. But instead of doing so, may be for ego, or any other reason best known to him, he had opted to stick with his earlier decision.

107. The Registrar has also assigned a reason that Grade-IV officials are having benefit of three stagnation increments, on completion of 4-9-14 years of service. Without taking note of verdict of the Apex Court, as indicated by the Division Bench in its order dated 4.12.2018, that grant of stagnation increments, under Assured Career Progression Scheme, is no substitute to the avenue of promotion to be provided to the employee, wherever it is possible. Therefore, rejection of the claim on this ground was also on misconceived notion of Registrar that promotional avenue can be denied, for availability of benefits of three stagnation increments.

108. Registrar has failed to visualize that even after providing a promotional avenue, by amending the Rules, as proposed, all undergraduate Grade-IV officials shall not be promoted and many of them, for various reasons, including availability of promotional post, may retire without any promotion and the benefit of stagnation increments, in fact, is for such employees, but not for denial of promotional avenue to a class of employees on this pretext.

109. Plea of Registrar that staffing pattern and cadre of Cooperative Bank and JCC Bank are different is also not a valid ground for rejection of proposal of the Cooperative Bank, for the reason that, as evident from the documents and information placed on record on affidavit and otherwise, on behalf of Registrar itself, during pendency of petitions, the staffing pattern of JCC Bank and Cooperative Bank, except teaching and training staff of Cooperative Bank, is identical in nature and so far as cadre strength is concerned, it is no ground for holding that corresponding employees of JCC Bank are not equivalent to such employees of Cooperative Bank. Therefore, notion of Registrar on this count is misconceived.

110. Another ground taken for rejection of proposal is rejection of proposal of KCC Bank, whereby exemption from appearing in the test was being sought. This plea is absurd, as Registrar itself, in his order, has stated that the proposal of KCC Bank was to relax Grade-IV officials of the Bank to exempt them from appearing in test for promotion to be conducted for further promotion to Grade-III post, which is not a proposal identical to the proposal in present case. Like Registrar, learned Advocate General as well as Dr. Lalit Sharma also seem to have misconceived that it is a proposal for 'one time relaxation', without noticing the fact that the proposal was for providing 'one time opportunity of promotion' by allowing the amendment in the Rules in the same fashion as has been done in JCC Bank's case.

111. Proposal for amendment in Rules is not for one time relaxation in the educational qualification as undergraduate Grade-IV officials were and are already eligible to be appointed/promoted as Grade-III Officers, but with Diploma in Cooperation Management provided under the Rules. But, the Registrar had failed to specify the procedure to regulate sponsorship of the Officers/officials of the Bank to acquire such qualification from a recognized institute which led to sponsorship of juniors prior to seniors resulting into promotion of juniors, causing prejudice to the rights of seniors and, as discussed supra, as of now the Cooperative Bank has stopped sponsoring the names and has also decided not to consider its employees to be eligible for promotion who acquired such Diploma without permission of the Cooperative Bank and, in such a situation, it has not only been made difficult but impossible for an undergraduate employee to acquire the qualification, making him eligible for consideration for promotion to Grade-III post, as provided in Rules, and thus, rendering the provision in Rules providing avenue for promotion to Grade-II as redundant.

112. I fail to understand for what reason the Registrar had termed the proposal of the Cooperative Bank to be vague, particularly when Registrar itself has subscribed by according approval to the identical Rule pertaining to JCC Bank. The reason for citing the proposal as 'one time opportunity of promotion' by the Cooperative Bank is apparent on the face of record, as for further promotion from Grade-III to Grade-II, a degree of recognized University

or certificate or diploma, i.e. CAIIB/HDC is mandatory and, therefore, an undergraduate Grade-III officer, without degree or certificate or diploma but permitted to be promoted from Grade IV on the basis of proposed Rules, would not be eligible for further promotion for want of requisite qualification. I do not find any reason to term such proposal as a vague proposal. Reasoning of the Registrar that no such amendment in the Rules can be carried out to afford only one time opportunity of promotion only is not baseless but absurd, particularly in view of subscription by approval of identical Rules of JCC Bank by Registrar itself.

113. In normal course, petitioners would have been relegated to the concerned authority, i.e. Registrar, for consideration and decision afresh but, in present case, earlier also the matter was referred by the Division Bench to the Registrar by giving him opportunity to reconsider the case, but second time also the Registrar had opted to stick with the decision. Therefore, I am of the considered view that relegating the matter for deciding afresh by the Registrar would be a futile exercise, resulting into wastage of time and energy of all stakeholders, including the State and Cooperative Bank.

114. At this stage, it would be apt to consider judgment cited by Mr. B.C. Negi, Senior Advocate, passed by the Supreme Court in ***Rameshwar and others v. Jot Ram and another,*** **(1976) 1 SCC 194,** whereby it has been reiterated that it is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Relevant Paras are as under:

> "6. The philosophy of the approach which commends itself to us is that a litigant who seeks justice in a perfect legal system gets it when he asks for it. But because human institutions of legal justice function slowly, and in quest of perfection, appeals and reviews at higher levels are provided for, the end product comes considerably late. But these higher Courts pronounce upon the rights of parties as the facts stood when the first Court was first approached. The delay of years flows from the infirmity of the judicial institution and this protraction of the Court machinery shall prejudice no one. *Actus curiae neminem gravabit*. Presidential support invoked by the appellant's counsel also lets him down provided we scan the fact situation in each of those cases and the legal propositions therein laid down.
>
> 7. The realism of our processual justice bends our jurisprudence to mould, negate or regulate reliefs in the light of exceptional developments having a material and equitable import, occurring during the pendency of the litigation so that the Court may not stultify itself by granting what has become meaningless or does not, by a myopic view, miss decisive alterations in fact-situations or legal positions and drive parties to fresh litigation whereas relief can be given right here. The broad principle, so stated, strikes a chord of sympathy in a court of good conscience. But a seeming virtue may prove a treacherous vice unless judicial perspicacity, founded on well-grounded rules,

studies the plan of the statute, its provisions regarding subsequent changes and the possible damage to the social programme of the measure if later events are allowed to unsettle speedy accomplishment of a re-structuring of the land system, which is the soul of the whole enactment. No processual equity can be permitted to sabotage a cherished reform, nor individual hardship thwart social justice. This wider perspective explains the rulings cited on both sides and the law of subsequent events on pending actions.

8. In *P. Venkateswarlu v. Motor and General Traders,* AIR 1975 SC 1409, 1410, this Court dealt with the adjectival activism relating to post-institution circumstances. Two propositions were laid down. Firstly, it was held that
'it is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding.'

This is an emphatic statement that the right of a party is determined by the facts as they exist *on the date the action is instituted*. Granting the presence of such facts, then he is entitled to its enforcement. Later developments cannot defeat his right because, as explained earlier, had the court found his facts to be true the day he sued he would have got his decree. The Court's procedural delays cannot deprive him of legal justice or rights crystallised in the initial cause of action. This position finds support in *Bhajan Lal v. State of Punjab*, (1971) 1 SCC 34."

115. Learned counsel for the petitioners has also referred to Para-11 of judgment of the Apex Court in ***Shangrila Food Products Ltd. and another v. Life Insurance Corporation of India and another*, (1996) 5 SCC 54,** which reads as under:

"11. It is well settled that the High Court in exercise of its jurisdiction under Article 226 of the Constitution can take cognizance of the entire facts and circumstances of the case and pass appropriate orders to give the parties complete and substantial justice. This jurisdiction of the High Court, being extraordinary, is normally exercisable keeping in mind the principles of equity. One of the ends of the equity is to promote honesty and fair play. If there be any unfair advantage gained by a party priorly, before invoking the jurisdiction of the High Court, the Court can take into account the unfair advantage gained and can require the party to shed the unfair gain before granting relief....."

116. In view of the above discussion, Writ Petitions are allowed in the following terms:

(i) Order dated 15.6.2017, passed by the Registrar, is arbitrary, irrational, unreasonable and violative of Article 14 of the Constitution of India and accordingly the same is quashed and set aside.

(ii) Omission on the part of Registrar, to subscribe just and fair procedure to regulate sponsorship of employees of the Bank for

Diploma/Certificate course in order of seniority, is a failure to perform statutory duty cast upon him under Statutory Rules 1971.

(iii) The Registrar is directed to subscribe just and fair procedure, in Service Conditions, in order to regulate sponsorship of employees of the Bank for Diploma/ Certificate course, in order of seniority, on or before 31st December, 2020.

(iv) Registrar is directed to accord approval to the proposal of Cooperative Bank to amend the Rules, submitted vide letter dated 17.4.2017, on or before 30th October, 2020, failing which approval shall be deemed to have been accorded by him.

(v) Approval/deemed approval shall be considered to have been granted on 15.6.2017.

(vi) On approval/deemed approval, the Cooperative Bank shall consider the case of the petitioners and others for promotion, within 15 days thereafter, who become eligible after giving effect to proposed amendment and who are already eligible, and to finalize the same latest by 30.11.2020.

(vii) Without Diploma undergraduate Grade-IV Officers/officials who had completed 20 years as on 15.6.2017 shall be considered eligible on that date and other such undergraduate Grade-IV Officers/officials shall acquire eligibility on completion of 20 years service. They shall be considered for promotion from 15.6.2017 or from later date on completion of 20 years of service, as the case may be, but subject to availability of post on that day or later.

(viii) Promotion from the date of acquiring eligibility by virtue of amendment shall be subject to availability of post at relevant point and it shall be on notional basis, and the same shall be counted as service in Grade-III for all intents and purposes, like other employees, except actual monetary benefits, which shall be granted to them on notional basis from said date till their date of actual promotion.

(ix) Petitioners in CWPs No.972 and 977 of 2017, for acquisition of mandatory qualification, are held to be eligible for promotion, even in absence of proposed amendment and they shall be considered accordingly and, if otherwise found eligible, they shall be considered for promotion from 15.6.2017, but subject to availability of post on that day or later, with all consequential benefits, and the same shall be counted as service in Grade-III for all intents and purposes, like other employees, except actual monetary benefits, which shall be granted to them on notional basis from said date till their date of actual promotion.

(x) Grade-IV Officers/officials of the Cooperative Bank, become eligible on account of aforesaid amendment in Bank Service Rules, shall be entitled for actual monetary benefits with prospective effect from the date of issuance of order of promotion by the competent authority.

(xi) Seniority, amongst all promotees, in Grade-IV, shall be redrawn immediately after including all employees acquiring eligibility.

All the petitions stand disposed of, so also pending application, if any.

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