

Between vs State on 13 October, 2022

Author: Sandeep Sharma

Bench: Sandeep Sharma

Reportable

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA
ON THE 13th DAY OF OCTOBER, 2022
BEFORE

HON'BLE MR. JUSTICE SANDEEP SHARMA
1. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1536 OF 2019

Between:

DEEPAK RAJ ANAND SON OF MOHAN
LAL, PRESENTLY WORKING AS FOOD
SAFETY OFFICER, CHAMBA, DISTRICT
CHAMBA, HIMACHAL PRADESH

....PETITIONER

(BY MR. NIMISH GUPTA,
ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH SECRETARY (HEALTH) -

CUM-FOOD COMMISSIONER TO
THE GOVERNMENT OF HIMACHAL

PRADESH, SHIMLA-2.

2. HIMACHAL PRADESH PUBLIC
SERVICE COMMISSION, THROUGH

SECRETARY NIGAM BIHAR,
SHIMLA, H.P.

3. DHARMENDER KUMAR, S/O NOT
KNOWN TO THE PETITIONER,
PRESENTLY POSTED IN THE O/O
THE CHIEF MEDICAL OFFICER,
KINNAUR, DISTRICT KINNAUR
(H.P.)

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4. ARUN KUMAR, S/O NOT KNOWN,

TO THE PETITIONER, PRESENTLY
POSTED IN THE O/O THE CHIEF
MEDICAL OFFICER, MANDI,
DISTRICT MANDI (H.P.).

5. ANIL SHARMA, S/O NOT KNOWN TO
THE PETITIONER, PRESENTLY
POSTED IN THE O/O THE CHIEF
MEDICAL OFFICER, HAMIRPUR,

DISTRICT HAMIRPUR, (H.P.)
PRESENTLY HIS H.Q. IS FIXED AT
O/O THE CHIEF MEDICAL
OFFICER, UNA DISTRICT UNA (H.P.)

6.

MAHESH KASHYAP, S/O NOT

KNOWN TO THE PETITIONER,
PRESENTLY POSTED IN THE O/O
THE CHIEF MEDICAL OFFICER,
BILASPUR DISTRICT BILASPUR
(H.P.)

7. SAVITA THAKUR W/O NOT KNOWN
TO THE PETITIONER, PRESENTLY
POSTED IN THE O/O THE CHIEF

MEDICAL OFFICER, CHAMBA
DISTRICT CHAMBA (H.P.)

8. VIJAYA KUMARI S/O NOT KNOWN
TO THE PETITIONER, PRESENTLY
POSTED IN THE O/O THE

DIRECTOR OF HEALTH SAFETY
AND REGULATION, SHIMLA,
DISTRICT SHIMLA, (H.P.) ALSO
HOLDING THE ADDITIONAL
CHARGE OF DESIGNATED
OFFICERS-CUM-ASSISTANT
COMMISSIONER (FOOD SAFETY)
M.C. SHIMLA.

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....RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL
ADVOCATE GENERAL, FOR
THE RESPONDENT-STATE)

(BY MR. VIKRANT THAKUR,
ADVOCATE, FOR R-2)

(BY MR. DILIP SHARMA,

SENIOR ADVOCATE WITH MR.
MANISH SHARMA AND
PANKAJ SHARMA,
ADVOCATES FOR THE
PRIVATE RESPONDENTS)

2. CIVIL WRIT PETITION NO. 1155 OF 2017

Between:

NIMISH GUPTA, S/O SH. V.K. GUPTA,
R/O PINE WOODS APARTMENTS,
FRIEND COLONY BADA I, NEAR SANKAT

MOCHAN TEMPLE, PO. TARADEVI,
DISTRICT SHIMLA, H.P.

....PETITIONER

(IN PERSON)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH SECRETARY CUM
COMMISSIONER FOOD SAFETY,
HIMACHAL PRADESH.

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2. STATE OF HIMACHAL PRADESH

THROUGH ITS CHIEF SECRETARY,

GOVERNMENT OF HIMACHAL
PRADESH

3. DEPARTMENT OF CONSUMER

AFFAIRS (MINISTRY OF CONSUMER
AFFAIRS, FOOD AND PUBLIC

DISTRIBUTION), KRISHI BHAVAN,
NEW DELHI, GOVERNMENT OF
INDIA, THROUGH ITS SECRETARY.

4. HIMACHAL PRADESH
SUBORDINATE STAFF SELECTION
BOARD.

r

....RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL
ADVOCATE GENERAL, FOR
THE RESPONDENT-STATE)

(BY MR. BALRAM SHARMA,
ASGI, FOR R-3)

(BY MS. ARCHANA DUTT,

ADVOCATE, FOR
RESPONDENT NO.4.)

Whether approved for reporting?. Yes.

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

ORDER

Since common question of law and facts is involved in both these petitions, same are being taken up together for hearing and disposed of by way of common judgment.

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2. For the sake of brevity, facts of CWP No. 1536 of 2019 are being discussed herein after.

3. Being aggrieved and dissatisfied with condition imposed under newly framed Recruitment & Promotion Rules, 2014, for the post of Designated Officer, Gezzetted, Class-I in the Department of Health and Safety and Regulation, Himachal Pradesh (Annexure A-2), which stipulates that 50% of the posts of Designated Officer are to be filled up by direct recruitment and 50% by way of promotion, petitioners herein, who were initially appointed as Food Inspector and subsequently, re-designated as Food Safety Officer, in the department of Health, Himachal Pradesh, approached the erstwhile HP State Administrative Tribunal by way of Original Application No. 4627 of 2015, which on account of abolishment of the Tribunal now stands transferred to this Court for adjudication and has been registered as CWPOA No. 1536 of 2019, praying therein for following relief:-

"A) That this Hon'ble Tribunal may kindly be pleased to quash and set-aside the Advertisement No. 4/2015 dated 09.10.2015 (Annexure A/3) to the extent of 5 posts of designated officer class I in the department of Health and family welfare.

B That Rule 7 and 10 of the Recruitment & Promotion Rules (R&P Rules) may very kindly be declared ultra vires and same may kindly be quashed and set aside.

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C. That this Hon'ble Tribunal may kindly be pleased to direct the respondents to provide 100% quota to the Food Safety Officer to the post of Designated Officer by way of amendment to the Recruitment & Promotion Rules (R&P Rules) for the post of Designated Officer Class I in the department of Health Safety and Regulations, Himachal Pradesh."

4. Precisely, grouse of the petitioner as has been highlighted in the petition and has been further canvassed by Mr. Nimish Gupta, learned counsel appearing for the petitioner is that minimum qualification provided under the Recruitment & Promotion Rules, 2014 for the post of Designated Officer Gazetted Class-I in the department of Health and Safety Himachal Pradesh is not in consonance with the qualification prescribed under the Food Safety and Standard Rules, 2011 and as such, no recruitment to the post of Designated Officer can be made on the basis of Recruitment & Promotion Rules promulgated in the year, 2014. Apart from above, petitioner is also aggrieved of action of respondents in filling up the post of Designated Officer by way of direct recruitment. As per petitioner, post of Designated Officer can only be filled up by way of promotion because qualification as prescribed under the Rules clearly provides that person equivalent to the rank of Sub Divisional Officer can be appointed as Designated Officer, meaning thereby, in service candidate, which in the case at hand is Food Safety Officer can only be appointed against the post of Designated Officer. Mr. Nimish Gupta, learned counsel representing the .

petitioner while making this Court peruse clause 2.1.2 of Rules, which directly deals with Designated Officer contended that Designated Officer shall be whole time officer, not below the rank of Sub Divisional Officer, meaning thereby, person already in service holding the rank of Sub Divisional Officer (Civil) or equivalent can be appointed as Designated Officer subject to his/her having qualification as prescribed under the Rules i.e. clause 3(a) of sub Rule 2.1.2 . He further submitted

that apart from the aforesaid category, Food Safety Officer having qualification as prescribed under the Recruitment & Promotion Rules are eligible to be appointed as Designated Officer, which in the case at hand is Food Safety Officer having 10 years regular service or regular combined with continuous ad-hoc service in the grade. While inviting attention of this Court to the advertisement No. 4/2015 (Annexure A-3), issued by the HP Public Service Commission dated 9.10.2015, Mr. Gupta, vehemently argued that since no person can be appointed against the post of Designated Officer on the basis of direct recruitment, there was no occasion, if any, for the department to advertise such posts for recruitment by way of direct recruitment. He further submitted that action of the respondents in carving out two categories for appointment to the post of Designated Officer i.e. 50% by way of direct recruitment and 50% by way of promotion, is not .

in accordance with law the rules because bare reading of rules clearly provides that person working in the govt. department either in the capacity of Sub Divisional Officer or equivalent rank or Food Safety Officer having 10 years regular service can be considered for appointment to the post of Designated Officer, if it is so, there was no requirement, if any, for the department to make provision for direct recruitment against 50% of the post of Designated Officer available in the department. While inviting attention of this court to the clarification dated 28.9.2017, issued by the Department of Health and Family Welfare, Mr. Gupta again reiterated that post of Designated Officer can only be filled up by a person holding the rank of Sub Divisional Officer (Civil) or equivalent and in case new persons having qualification as prescribed under the Recruitment & Promotion Rules are directly appointed against the post of Designated Officer, that would not only defeat the very object of the rules, but also would cause serious prejudice to the persons like petitioner, who are working in the department for number of years. He further submitted rules which came to be amended in the year 2017 clearly reveal that person in the rank of Sub Divisional Officer or equivalent can only be appointed against the post of Designated Officer, meaning thereby, there is no scope left for the department to invite applications for the post of Designated Officer by way .

of direct recruitment and post of Designated Officer can only be filled up by way of promotion amongst the candidates already working in the department as Food Safety Officer having ten years regular service.

5. Mr. Ajay Vaidya, learned Senior Additional Advocate General and Mr. Dilip Sharma, learned Senior Advocate, while refuting the aforesaid submissions made by the learned counsel for the petitioner vehemently argued that reliefs otherwise prayed for in the instant petition cannot be granted, especially while exercising power under Section 226 of the Constitution of India. They submitted that this court while exercising jurisdiction under Article 226 of the Constitution of India would not direct the respondent-State to provide 100% quota to Food Safety Officer against the post of Designated Officer that too by ordering amendment in the Recruitment & Promotion Rules for the post of Designated Officer, Class-I in the department of Food Safety, Himachal Pradesh. They further submitted that otherwise also, Rules 7 and 10 of the Recruitment & Promotion Rules, which are being sought to be declared ultra-vires cannot be declared unconstitutional because same are strictly in conformity with the qualification as prescribed under clause 2.1.2 of the Food and Safety Standard Rules 2011. While making this Court read clause 2.1.2 of un- amended Rules, 2011, they

argued that Designated Officer shall be whole .

time officer not below the rank of Sub Divisional Officer or equivalent but that does not mean that only person holding the rank of Sub Divisional Officer or equivalent can be appointed as Designated Officer, rather person appointed as Designated Officer having qualification as prescribed in clause 2.1.2 of Rules 2011 after his having been appointed as Designated Officer shall be of the rank of Sub Divisional Officer or equivalent and he should be whole time officer. Mr. Dilip Sharma, learned Senior Counsel, argued that Section 36 of the Act specifically deals with the Designated Officer under the Act, which empowers the Commissioner of Food Safety to appoint the Designated Officer, but such officer shall not be below the rank of Sub Divisional Officer, however, this provision, nowhere suggests that posts of Designated Officer cannot be filled by way of direct recruitment, rather department is well within its right to fill up the posts by way of direct recruitment, but for that purpose, qualification as prescribed under the rules is required to be provided under the Recruitment & Promotion Rules, which in the present case has been duly prescribed. While making this court peruse the provision of qualification as specified under the rules, Mr. Sharma argued that qualification as prescribed under the Rules, if perused juxtaposing qualification prescribed under clause-7 of Recruitment & Promotion Rules, 2014, petitioner may not be right in contending that .

qualification as prescribed under Rule 7 of the Recruitment & Promotion Rules is not in consonance with the parent Rules of year, 2011. He further submitted that if argument of learned counsel for the petitioner is accepted that only Food Safety Officers working in the department are entitled to be appointed as Designated Officer, provision made in clause-1 of 2.1.2 of Rules would become redundant because in that provision, it has been specifically provided that Designated Officer shall be a whole time officer not below the rank of Sub Divisional Officer but must possess minimum qualification of bachelor's in Science and Chemistry in one of the subject or at least one of the educational qualification prescribed under these rules. Lastly, learned counsel for the respondents argued that otherwise also, State enjoys vast power under Article 309 of the Constitution of India to frame rules and regulations, particularly with regard to recruitment, promotion and condition of service, which cannot be laid challenge save and except, same are shown to be against the parent Act and any other provision of the Constitution. In support of their aforesaid submissions, they placed reliance upon many judgments, which shall be taken into consideration in the later part of the judgment.

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

through the records of the case.

7. Before ascertaining the correctness of the rival submissions made by the learned counsel for the parties, this court deems it fit to take note of the relevant provisions of the Food Safety and Standards Act, 2006, which read as under:

"Section 3 in The Food Safety and Standards Act, 2006 3 Definitions. -

(1) In this Act, unless the context otherwise requires,-

(a) to (g).....

(h) "Designated Officer" means the officer appointed under section 36;

(i) ".....

Section 36 Designated Officers

1. The Commissioner of Food Safety shall, by order, appoint the Designated Officer, who shall not be below the rank of a Sub-

Divisional Officer, to be in-charge of food safety administration in such area as may be specified by regulations.

2. There shall be a Designated Officer for each district.

3. The functions to be performed by the Designated Officer shall be as follows, namely:-

a. to issue or cancel licence of food business operators;

b. to prohibit the sale of any article of food which is in contravention of the provisions of this Act and rules and regulations made thereunder;

c. to receive report and samples of article of foods from .

Food Safety Officer under his jurisdiction and get them analysed;

d. to make recommendations to the Commissioner of Food Safety for sanction to launch prosecutions in case of contraventions punishable with imprisonment;

e. to sanction or launch prosecutions in cases of contraventions punishable with fine;

f. to maintain record of all inspections made by Food Safety Officers and action taken by them in the performance of their duties;

g. to get investigated any complaint which may be made in writing in respect of any contravention of the provisions of this Act and the rules and regulations made there under;

h. to investigate any complaint which may be made in writing against the Food Safety Officer; and i. to perform such other duties as may be entrusted by the Commissioner of Food Safety.

8. Careful perusal of definition as provided under Section 3 (1) (h) reveals that "Designated Officer" would mean the officer appointed under Section 36. If the provision of law as contained under Section 36 of the Act is read in its entirety, it clearly reveals that it empowers the Commissioner Food Safety, by order, to appoint the Designated Officer, who shall not be below the rank of a Sub-Divisional Officer and he would be the in-charge of the food safety administration in such area as may be specified by regulation. It also enumerates the functions to be performed by the Designated Officer i.e., to issue or cancel licence of food business .

operators; to prohibit the sale of any article of food, which is in contravention of the provisions of this Act and rules and regulations made thereunder; to receive report and samples of article of foods from Food Safety Officer under his jurisdiction and get them analysed; to make recommendations to the Commissioner of Food Safety for sanction to launch prosecutions in case of contraventions punishable with imprisonment; to sanction or launch prosecutions in cases of contraventions punishable with fine; to maintain record of all inspections made by Food Safety Officers and action taken by them in the performance of their duties; to get investigated any complaint which may be made in writing in respect of any contravention of the provisions of this Act and the rules and regulations made there under; to investigate any complaint which may be made in writing against the Food Safety Officer; and to perform such other duties as may be entrusted by the Commissioner of Food Safety.

9. It would also be apt to take note of Rule 2.1.2 of the Old Rules 2006, which deal with qualification of Designated Officer:

2.1.2: Designated Officer

1. Qualification

(i) The Designated Officer shall be a whole time Officer, not .

below the rank of Sub-Divisional Officer or equivalent and shall possess a minimum of bachelors' degree in Science with chemistry as one of the subjects or at least one of the educational qualifications prescribed for the Food Safety Officer under these Rules.

(ii) He shall undergo training as may be specified by the Food Authority, within a period of six months from the date of his appointment as Designated Officer.

(iii) (a) persons having been appointed as food Inspector having qualification prescribed under the PFA Rules, 1955 or as Local Health Authority shall be eligible for appointment as Designated Officer, subject to fulfilling such other conditions as may be prescribed for the post of Designated Officer by the State Government.

(b) At the time of commencement of these rules, the post of designated Officer is held by any other officer of equivalent rank as additional charge basis such other officer shall continue to hold such

additional charge till such time a whole time Designated Officer is appointed or for a period of one year whichever is earlier.

2. Powers and duties:

- (i) The powers and duties of the Designated Officer shall be as mentioned in section 36 (3) of FSS Act, 2006.
- (ii) The Designated officer shall function under overall supervision of collector/ District Magistrate of the District.
- (iii) The Designated Officer shall, in addition to the powers specified in Section 36 (3) of FSS Act, 2006, also ensure the refund of fee for analysis paid by the purchaser as per the provision of Section 40 (1), besides the cost of the sample
- (iv) The Designated Officer shall ensure timely disposal of .

redundant samples, in the manner notified for the seized materials, by the Commissioner of Food Safety.

(v) Without prejudice to anything contained in the aforesaid Rules, the Designated Officer shall have all administrative powers which may include suspension, cancellation or revocation of the license of the Food Business Operator in case any threat or grave injury to public, has been noticed in the report of the Food Analyst, Provided that while taking such administrative action the procedure described in the Act and Regulations shall be followed.

10. Bare reading of aforesaid Rule reveals that Designated Officer shall be a whole time officer not below the rank of Sub Divisional Officer or equivalent and he must possess minimum of bachelors' degree in science with chemistry as one of the subjects or at least one of the educational qualifications prescribed for the Food Safety Officer under these rules. It further provides that once person concerned is appointed as Designated Officer, he must undergo training as may be specified by the food authority within six months from the date of his appointment. Clause (iii) (a) of the aforesaid Rule clearly reveals that Food Inspector having qualification prescribed under PFA Rules 1955 or as Local Health Authority, would be eligible for appointment as Designated Officer subject to his/her fulfilling such other conditions as may be prescribed for the post of Designated Officer by the State Government. Most importantly, clause iii (b) provides that if at the time of commencement of these rules, the post of Designated .

Officer is held by any other officer of equivalent rank as additional charge basis, such other officer shall continue to hold such additional charge till such time a whole time Designated Officer is appointed or for a period of five years, whichever is earlier.

11. Having carefully perused aforesaid provision of law/rules, this court finds it difficult to agree with Mr. Nimish Gupta, learned counsel for the petitioner that as per Clause 1 (i) of Rules 2.1.2, only

person holding the rank of Sub Divisional Officer or equivalent can be appointed against the post of Designated Officer, rather plain reading of the aforesaid rule clearly provides that Designated Officer should be a whole time officer of the rank of Sub Divisional Officer or equivalent so that power and duties assigned or attached with such posts are exercised in continuity and work of the department does not suffer because of his other engagements, if any, held by him beyond the provisions under the Food Safety Act. Though this Court finds no quarrel with the submission of Mr. Nimish Gupta, learned counsel for the petitioner that Designated Officer cannot be below the rank of Sub Divisional Officer or equivalent as per the rules as taken note herein above, but that does not mean that only person holding the rank of Sub Divisional Officer or equivalent would only be entitled to be appointed against the post of Designated Officer. Since Designated Officer is required .

to perform administrative duties, which are onerous in nature and normally, in his/her absence are performed by the officer of rank of Sub Divisional Officer or equivalent on additional charge basis, rule makers purposely made a provision that Designated Officer shall be a whole time officer not below the rank of Sub Divisional Officer or equivalent having qualification as prescribed under the rules itself. Aforesaid conclusion drawn by this Court is further fortified by the provision contained under clause iii (b), which itself indicates that while process for appointment on regular basis is underway, person holding the post of Designated Officer on additional charge basis shall continue to hold the charge of the district till the time same is filled up on regular basis.

12. If Section 36 of the Act, as reproduced herein above, is read in its entirety, it suggests that Commissioner of Food Safety is entitled to appoint the Designated Officer by order, but definitely subject to fulfillment of the conditions as prescribed under the Recruitment & Promotion Rules and Central Regulations. Government of Himachal Pradesh vide notification dated 29.10.2011 has appointed Principal Secretary (Health) to the Government of Himachal Pradesh as Commissioner of Food Safety for the State of Himachal Pradesh in exercise of power conferred by sub-section (1) of Section 30 of the Food Safety and Standards Act, 2006 (34 of 2006).

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Otherwise also, Section 36 of the Act nowhere suggests that post of Designated Officer cannot be filled up by way of direct recruitment as has been submitted by Mr. Nimish Gupta, learned counsel for the petitioner, rather under Section 36, Commissioner of Food Safety can appoint Designated Officer by way of direct recruitment in terms of Recruitment & Promotion Rules, but in case, Designated Officer recruited on the basis of direct recruitment is not available, he/she can order appointment of an officer holding rank of Sub Divisional Officer to be in-charge of food safety administration in such area as may be specified by regulations.

13. It is pertinent to take note of the fact that qualification as prescribed under the Rule 2.1.2 of the old Rules, was amended by way of an amendment dated 13.9.2017, which came into force w.e.f. 15.12.2017, whereby minimum qualification of bachelors' degree in science with chemistry as one of the subject or at least one of the educational qualification as prescribed under the Rules was removed. Amended 2.1.2 rule reads as under:

"2.1.2: Designated Officer

1. Qualification: -

(i) The Designated Officer shall be a whole time Officer, not below the rank of Sub-Divisional Officer or equivalent.

[(ia) The commissioner of Food Safety may with the previous .

approval of the State Government, appoint Sub-divisional Officer of the area on additional charge basis as Designated Officer.]

(ii) He shall undergo training as may be specified by the Food Authority, within a period of six months from the date of his appointment as Designated Officer.

[Provided the Sub-Divisional Officer of the area appointed as Designated Officer under clause (i) shall not require to undergo such training.]

(iii)(a) persons having been appointed as food Inspector having qualification prescribed under the PFA Rules, 1955 or as Local Health Authority shall be eligible for as Designated Officer, subject to fulfilling such other conditions as may be prescribed for the post of Designated Officer by the State Government.

(b) At the time of commencement of these rules, the post of designated Officer is held by any other officer of equivalent rank as additional charge basis such other officer shall continue to hold such additional charge till such time a whole time Designated Officer is appointed or for a period of (eight year), whichever is earlier.

2. Powers and duties: - (i) The powers and duties of the Designated Officer shall be as mentioned in section 36 (3) of FSS Act, 2006.

(ii) The Designated officer shall function under overall supervision of collector/District Magistrate of the District.

[iia) Where the Collector or District Magistrate considers necessary, he may delegate the powers exercisable by him under clause (ii) to an Additional Collector or Additional District Magistrate or a Sub-

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Divisional Officer of the area.]

(iii) The Designated Officer shall, in addition to the powers specified in Section 36 (3) of FSS Act, 2006, also ensure the refund officer for analysis paid by the purchaser as per the provision of

Section 40 (1), besides the cost of the sample.

(iv) The Designated Officer shall ensure timely disposal of redundant samples, in the manner notified for the seized materials, by the Commissioner of Food Safety.

(v) Without prejudice to anything contained in the aforesaid Rules, the Designated Officer shall have all administrative powers which may include suspension, cancellation or revocation of the license of the Food Business Operator in case any threat or grave injury to public, has been noticed in the report of the Food Analyst.

Provided that while taking such administrative action the procedure described in the Act and Regulations shall be followed."

14. While placing heavy reliance upon the aforesaid amendment, Mr. Nimish Gupta, vehemently argued that bare reading of the amended provision itself suggests that only person holding the rank of Sub Divisional Officer or equivalent can only be appointed as Designated Officer. While referring to the clause-iii (a) of the aforesaid Rule, he further submitted that apart from the aforesaid category of officer holding the rank of Sub Divisional Officer or equivalent, Food Inspector having qualification prescribed in PFA Rule 1955 and qualification as prescribed in Recruitment & Promotion Rules qua the post of Designated Officer by the State are only entitled to be considered for appointment against the post of Designated .

Officer. Though amended rule as detailed herein above has no application in the present case because appointment against the post of Designated Officer in the case at hand came to be made pursuant to advertisement issued in the year, 2015 on the basis of un-amended regulations, wherein there was a specific provision with regard to minimum qualification as has been taken note herein above, but even otherwise if the amended provision is read in its entirety, it nowhere supports the contention of the petitioner because it nowhere suggests that appointment against the post of Designated Officer cannot be made on the basis of direct recruitment. No doubt, in the amended rule, it has been provided that Designated Officer shall be whole time officer not below the rank of Sub Divisional Officer or equivalent, but it has been nowhere provided in the amended rule that such post can only be filled up amongst in-service candidates holding the rank of Sub Divisional Officer in some other department or Food Safety Officer having requisite qualification to be appointed against the post of Designated Officer as provided under the Recruitment & Promotion Rules.

Even if submission made by Mr. Nimish Gupta, is examined from another angle that only Food Safety Officers are entitled to be appointed against the post in question, case of the petitioner is bound to fail because admittedly Food Safety Officer does not hold the rank of Sub Divisional Officer or .

equivalent. As far as clarification dated 28.9.2017, issued by the Ministry of Health and Family Welfare, Government of India, is concerned, it itself suggests that under Section 36, responsibility of supervision of administration by Designated Officer can be delegated to Additional Collector or

Additional District Magistrate or Sub Divisional Officer for effective administration of the said act, but aforesaid department after having taken note of the difficulty being faced by the various State Governments with regard to availability of persons having qualification as prescribed under the un-amended regulations clarified that condition of having bachelors degree in Science and Chemistry and possessing one of the Educational Qualification prescribed for Food Safety Officer in the rules for appointment as Designated Officer is deleted, as a consequence of which, amendment came to be made in the regulations as has been taken note herein above. Though Mr. Nimish Gupta, while making this Court peruse the aforesaid clarification vehemently argued that only officer of the rank of Sub Divisional Officer having qualification as prescribed under the parent regulations can be appointed as a Designated Officer, but if the clarification given by the govt. is read in its entirety, it itself suggests that govt. with a view to have effective administration in the department and to avoid/give additional charges of the post in question to the Collector or .

district Magistrate of the state having responsibilities of the district itself, provided for appointment of Designated Officer by way of direct recruitment on the basis of qualification to be provided by the state as per their requirement. It would be apt to take note of the following paras of the aforesaid clarification "Subject: Amendments in the Food Safety and Standards Rules, 2011.

Sub-section (1) of section 36 of the Food Safety and Standards Act, 2006 provides that the Commissioner of Food Safety shall, by order, appoint the Designated Officer, who shall not be below the rank of a Sub-Divisional Officer, to be in-charge of food safety administration in such area as may be specified by regulations. Further, the qualification for the appointment of Designated Officer and power and duties have been prescribed in Chapter 2 - Enforcement Structure and Procedures, Rule 2.1.2 of the Food Safety and Standards Rules, 2011 made under section 91 of the said Act, 2006. The said rules are reproduced below:-

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2. It has been brought to the notice of the Ministry that some of the States Government and Union Territories Administration are facing difficulties in appointing the Designated Officer of the rank of Sub-

Divisional Officer, possessing a minimum of bachelors' degree in science with Chemistry as one of the subjects or at least one of the educational qualifications prescribed for the Food Safety Officer which are of technical nature. This situation is resulting in hindrance .

in appointment of designated officer on a regular basis. Further, it is provided under clause (ii) of sub-rule 2 of rule 2.1.2 of the said Rules that the Designated Officer shall function under overall supervision of Collector or District Magistrate of the District. It is felt that the Collector or District Magistrate having multifarious responsibilities of the District and some time specially during

festivals, election duties particularly in bigger Districts, the Collector or District Magistrate may not find sufficient time to discharge day to day functions required under the aforesaid Rules.

3. Keeping in view of the above and experience gathered over the period of the administration of the said Act, it is proposed to delete the requirement of science graduate with Chemistry and possessing one of the education qualifications prescribed for Food Safety Officer under the said Rules, for appointment as Designated Officer. It will give flexibility and more manpower will be available for appointment as Designated Officer. Further, it is also proposed that the responsibilities of supervision of administration of the Designated Officer may be delegated to Additional Collector or Additional District Magistrate or Sub-Division Officer for effective administration of said Act. It is also relevant to mention herethat the said proposals are in consonant with section 36 of the said Act as the said section nowhere provides any qualification for the post of Designated Officer except that the Designated Officer shall not be below the rank of a Sub-Divisional Officer."

15. During proceedings of the case, Mr. Ajay Vaidya, learned Senior Additional Advocate General, made available copy of the notification dated 24.3.2022, received from the office of Joint Director, (Regulatory Compliance), Food Safety and Standards Authority of India, whereby in .

response to the clarification sought by the State of Himachal Pradesh regarding the post of Designated Officer, aforesaid authority categorically clarified that posts of Designated Officer can be filled through direct recruitment but his/her rank should be kept as of Sub Divisional Officer, which would be the pay band applicable to the post of SDO. Clarification dated 24.3.2022 reads as under:

"To
r Dr. Vijaya Kumari,
Asstt. Commissioner (Food Safety)-
cum-Designated Officer,
H.Q., DHSR, Shimla, h.p.

24th March, 2022

Subject: Clarifications sought by state of Himachal Pradesh regarding the post of Designated Officer-reg.

Dear Ma'am This has reference to your letter dated 10.12.2021 regarding CWPOA No. 1536/2019 Deepak Raj Anand vs State of HP & Ans. Wherein some clarifications were sought. The clarifications are as follows:

1. The post of Designated Officer can be filled through direct recruitment. Most of the State/UTs have framed the recruitment regulations for the appointment of officers to function under the FSS Act, 2006.

2. Regarding qualifications of Designated Officer, there is no .

qualification stipulated under the Act, Rules and Regulations.

The States may frame the educational qualifications required under the respective Recruitment Regulations. The essential aspect is that the rank of DO in the State Government should be kept as of Sub Divisional Officer which primarily would be the pay bank applicable to the post of SDO.

3. With regard to the issue whether it is mandatory for the recruits to the post of DO to undergo FSSAI training, it is submitted that Rule 2.1.2(1) (ii) of the FSS Rules 2011 states that " he shall undergo training as may be specified by the food authority within a period of 6 months from the date of his appointment as designated officer." The officer appointed as DO will have to undergo training, except those having additional charge under Rule 2.1.2 (1) (ia).

16. Mr. Vaidya further apprised this Court that Designated Officer appointed pursuant to advertisement issued in the year, 2015 has been given pay band applicable to the post of Sub Divisional Officer.

17. Leaving everything aside, Mr. Nimish Gupta, learned counsel for the petitioner has not been able to show that qualification as prescribed under the rule-7 of Recruitment & Promotion Rules is not in consonance with the qualification as prescribed under the parent regulation of 2011, rather qualification prescribed by the state government in Recruitment & Promotion Rules is parametria same as has been prescribed under the .

regulations and Food Safety Officers working in the department have also been held entitled to compete for the post of Designated Officer. Apart from the above, department has further protected the interest of Food Safety Officer working in the department by reserving 50% posts of "Designated Officer" to be filled by way of promotion amongst the Food Safety Officers working in the department and as such, there appears to be no illegality or unconstitutionality in the Recruitment & Promotion Rules, especially clauses 7 and 10. Though in view of the detailed discussion made herein above, this court finds no illegality and infirmity in the action of the respondents in as much as filling up the posts of "Designated Officer" in terms of Recruitment & Promotion Rules 2014, by way of direct recruitment, but even otherwise by now it is well settled that it is the exclusive domain of the State Government/employer to make /provide the regulations with regard to recruitment, promotion and condition of service and it cannot be interfered unless it is shown to the court that same are in conflict with the provisions contained under the parent regulations and Constitution of India Reliance in this regard is placed upon Captain B.D. Gupta v. State of UP and Anr, 1991 Supp (1) SCC 1, wherein it has been specifically held that it is for the rule making authority to decide the mode of appointment to the post whether by promotion or by direct recruitment.

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Relevant para of the afore judgment reads as under:

"17. In support of his first contention that the Rules were framed mala fide and arbitrarily, Shri Ramamurthy relied firstly upon the fact that under the Rules only three posts were created leaving the rest of the posts to be filled in by executive instructions. If the Rules were framed for making regular appointments in the Civil

Aviation Department, there was no reason why they should have been confined only to three posts which included the post of Director. Secondly, he pointed out that whereas the post of Director was not a promotional one earlier and was, therefore, open to external candidates as well, it was made promotional to suit Captain Singh.

These circumstances according to us do not prove the mala fides. Admittedly, the Rules are made under Article 309 of the Constitution of India and are, therefore, a piece of legislation. It is well-settled that no legislation can be challenged on the ground of mala fides. On facts also, we find that there is no substance in the allegation of mala fides. The Rules were framed on July 7, 1982 and the Selection Committee made the order on July 15, 1982. The Committee found Captain Singh fit and, therefore, appointed him with effect from the same date, i.e., 15th July, 1982. He came to be confirmed subsequently by an order of November 10, 1982 w.e.f. August 4, 1982. Further, whether the Rules should have provided for appointment to the post by promotion or by direct recruitment, it was for the legislature to decide. There is no dispute that the post of Director is only one in the Directorate. As stated by the petitioner himself in his writ petition filed in the High Court, there was no special qualification required for the post of Director and hence an IAS/PCS officer could also be appointed to the said post. If that be so, then no wrong could be attributed to the framers of the Rules if .

the post was made promotional one opening an avenue of promotion to the departmental staff. What is further, as pointed out by the Government, Captain Singh who was in the Directorate from the inception, i.e., May 1979 as a regular employee all along had the requisite qualifications. As against it the petitioner was employed in the Directorate for the first time on 1st August, 1980 and on fixed contractual tenure. The chart of the comparative qualifications produced by the Government shows that there is no substance in the contention advanced on behalf of the petitioner that the relevant qualifications were acquired by Captain Singh after his appointment as Director. It is not necessary to reproduce the said qualifications here and burden the judgment."

18. Reliance is also placed upon judgment passed by the Hon'ble Apex Court in *Mallikarjuna Rao and Ors v. State of Andhra Pradesh and Ors*, (1990) 2 SCC 707, wherein it has been held that High Court /Tribunal cannot direct the government to frame statutory rules or amend the existing statutory Rules under Article 309 to alter the conditions of service of the Civil servants in terms of the directions. Apart from above, it has been further held that court cannot usurp the functions assigned to the executive under the Constitution and cannot even indirectly require the executive to exercise its rule making power in any manner and cannot assume to itself a supervisory role over the rule making power of the executive under Article 309. Relevant paras of the aforesaid judgment reads as under:

"9.It may be mentioned that G.O. Ms. No. 1 dated 1.1.76 which was .

directed to be adopted and followed in the Animal Husbandry Department related to the Agriculture Department. It was argued before the Tribunal that because of functional differences between the two departments it would not be possible to adopt the conditions of service prevalent in the Agriculture Department. The Tribunal, however, issued the above quoted directions primarily on the ground that the State Government was bound to follow the observations of the High Court made in Civil Writ Petition No. 4532 of 1971.

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12. This Court relying on *Narender Chand Hem Raj & Ors. v. Lt.*

Governor, Union Territory, Himachal Pradesh & Ors., [1972] 1 SCR 940 and *State of Himachal Pradesh v. A parent of a student of medical college, Simla and Ors.*, [1985] 3 SCC 169 held in *Asif Hameed & Ors. v. State of Jammu & Kashmir & Ors.*, [1989] Supp. 2 SCC 364, as under:

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

legislature or executive."

13. The Special Rules have been framed under Article 309 of the Constitution of India. The power under Article 309 of the Constitution of India to frame rules is the legislative power. This power under the constitution has to be exercised by the President or the Governor of a State as the case may be. The High Courts or the Administrative Tribunals cannot issue a mandate to the State Government to legislate under Article 309 of the Constitution of India. The Courts cannot usurp the functions assigned to the executive under the constitution and cannot even indirectly require the executive to exercise its rule making power in any manner. The Courts cannot assume to itself a supervisory role over the rule making power of the executive under Article 309 of the Constitution of India."

19. Hon'ble Apex Court in *V.K. Sood v. Secretary, Civil Aviation and Ors*, 1993 Supp (3) SCC 9, has held that in exercise of rule making power under Proviso to Article 309, the President or authorised person is entitled to prescribe the method (of recruitment, educational and technical qualifications or conditions of service for appointment to an office or post under the State. These rules having been made in exercise of power under Proviso to Article 309 of the Constitution of India being statutory

cannot be impeached on the ground that the authorities have prescribed tailor made qualifications to suit the selected individuals.

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Relevant pars No. 3, 6 and 7 are as under:

"3. It is not in dispute that these rules have been made by the President exercising the power under proviso to Art. 309 of the Constitution which read thus :

"309. Recruitment and conditions of service of persons serving the Union or a State- Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State to make rules regulating the recruitment, and the conditions of service of persons appointed, to such service and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act."

It would thus clear that the rules made by the President or authorised person under proviso to Art. 309 are subject to any law made by the Parliament and the power includes rules regulating the recruitment and the conditions of service or post. They are statutory and legislative in character. The statutory rules thus made are .

subject to the law that may be made by the Parliament.

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6. Thus it would be clear that, in the exercise of the rule making power, the president or authorised person is entitled to prescribe method of recruitment, qualifications both educational as well as technical for appointment or conditions of service to an office or a post under the State. The rules thus having been made in exercise of the power under proviso to Art. 309 of the Constitution, being Statutory, cannot be impeached on the ground that the authorities have prescribed tailor made qualifications to suit the stated individuals whose names have been mentioned in the appeal. Suffice to state that it is settled law that no motives can be attributed to the Legislature in making the law.

The rules prescribed qualifications for eligibility and the suitability of the appellant would be tested by the Union Public Service Commission. It is next contended that several persons whose names have been copiously mentioned in the appeal were not qualified to hold the post of examiner and they were not capable even to set the test papers to the examiners nor capable to evaluate the papers. We are not called upon to decide the legality of their appointments nor their credentials in this appeal as that question does not arise nor are they before the court.

7. It is next contended by Mr. Yogeshwar prasad, the learned Senior counsel that on account of inefficiency in the pilots' operational Capability repeatedly air accidents have been occurring endangering the lives of innocent travellers and this Court should regulate the prescription of higher qualifications and strict standard to the navigators or to the pilots be instead on. We are afraid that we .

cannot enter into nor undertake the responsibility in that behalf'. It is for the expert body and this Court does not have the assistance of experts. Moreover it is for the rule making authority or for the legislature to regulate the method of recruitment, prescribe qualifications etc. It is open to the President or the authorized person to undertake such exercise and that necessary tests should be conducted by U.P.S.C. before giving, the certificates to them. This is not the province of this Court to trench into and prescribe qualifications in particular when the matters are of the technical nature. It is stated in the counter affidavit that due to advancement of technology of the flight aviations the navigators are no longer required and therefore they are not coming in large number. Despite the repeated advertisements no suitable candidate is coming forward, We do not go into fault aspect also and it is not necessary for the purpose of this case. Suffice to state that pursuant to another advertisement made in July 1992, the appellant is stated to have admittedly applied for and appeared before the U.P.S.C. for selection and that he is awaiting the result thereof. Under these circumstances, we do not find any substance in this appeal. The appeal is accordingly dismissed. No costs."

20. Reliance is also placed on S. Satyapal Reddy and Ors v. Govt.

of AP and Ors (1994) 4 SCC 391, wherein it has been held that power to prescribe qualification is included in the power of appointment "5. Having given our anxious consideration to the respective contentions, we find that the State's contention merits acceptance. It is seen that marginal note in Section 213 for "appointment of Motor .

Vehicles Officers" indicates the subject-matter of the section. Sub-

section (1) says that the State Government may, for the purpose of carrying into effect the provisions of this Act, establish Motor Vehicles Department and "appoint as officers thereof such persons as it thinks fit". The power of appointment includes the power to select a fit and competent person who it thinks fit to hold the post and would discharge efficiently the functions assigned under the Act. It includes the power to prescribe qualifications to select suitable officers. The Parliament preserved that power to the State Government under Section 213(1) itself by allowing it to appoint the officers whom it finds fit to carry into effect the provisions of the Act. Sub-section (4) gives power to the

Central Government, having regard to the object of the Act, by a notification in the Official Gazette "to prescribe minimum qualification" which the officers or class of officers thereof shall possess for being appointed as such officer or to the cadre belonging to the State Government. Under Entry 41 of List 11 (State List) of VIIth Schedule to the Constitution, the public service includes the services of the officers to be appointed under sub-section (1) of Section 213 of the Act. No doubt, as contended by the learned counsel for the appellants that the Act receives paramountcy, since under Entry 35, the subject under the Act covers the concurrent field. Sub-section (4) of Section 213 also preserves the power to prescribe qualifications higher than that "minimum qualification"

prescribed by the Central Government to appoint the "said officers or any class thereof shall possess for being appointed as such".

6. In *Union of India v. H.S. Dhillon*¹ considering the scope of Article 246 of the Constitution, a Bench of seven Judges of this Court held thus (SCR p. 47: SCC p. 788, para 14) "Reading Article 246 with the three lists in the VIIth Schedule, it .

is quite clear that Parliament has exclusive power to make laws with respect to all the matters enumerated in List I and this notwithstanding anything in clauses (2) and (3) of Article

246. The State Legislatures have exclusive powers to make laws with respect to any of the matters enumerated in List II, but this is subject to clauses (1) and (2) of Article 246. The object of this subsection is to make parliamentary legislation on matters in Lists I and III paramount. Under clause (4) of Article 246 Parliament is competent also to legislate on a matter enumerated in State List for any part of the territory of India not included in a State. Article 248 gives the residuary powers of legislation to the Union Parliament."

7. It is thus settled law that Parliament has exclusive power to make law with respect to any of the matters enumerated in List I or concurrent power with the State Legislature in List III of the VIIth Schedule to the Constitution which shall prevail over the State law made by the State Legislature exercising the power on any of the entries in List 111. If the said law is inconsistent with or incompatible to occupy the same field, to that extent the State law stands superseded or becomes void. It is settled law that when Parliament and the Legislature derive that power under Article 246(2) and the entry in the Concurrent List, whether prior or later to the law made by the State Legislature, Article 246(2) gives power, to legislate upon any subject enumerated in the Concurrent List, the law made by Parliament gets paramountcy over the law made by the State Legislature unless the State law is reserved for consideration of the President and receives his assent. Whether there is an apparent repugnance or conflict between Central and State laws occupying the same field and cannot operate harmoniously in each case the court .

has to examine whether the provisions occupy the same field with respect to one of the matters enumerated in the Concurrent List and whether there exists repugnancy between the two laws. Article 254 lays emphasis on the words "with respect to that matter". Repugnancy arises 1 (1971) 2 SCC 779: (1972) 2 SCR 33 when both the laws are fully inconsistent or are absolutely irreconcilable and when it is impossible to obey one without disobeying the other. The repugnancy would arise

when conflicting results are produced when both the statutes covering the same field are applied to a given set of facts. But the court has to make every attempt to reconcile the provisions of the apparently conflicting laws and court would endeavour to give harmonious construction. The purpose to determine inconsistency is to ascertain the intention of Parliament which would be gathered from a consideration of the entire field occupied by the law. The proper test would be whether effect can be given to the provisions of both the laws or whether both the laws can stand together. Section 213 itself made the distinction of the powers exercisable by the State Government and the Central Government in working the provisions of the Act. It is the State Government that operates the provisions of the Act through its officers. Therefore, sub-

section (1) of Section 213 gives power to the State Government to create Transport Department and to appoint officers, as it thinks fit.

Sub-section (4) thereof also preserves the power. By necessary implication, it also preserves the power to prescribe higher qualification for appointment of officers of the State Government to man the Motor Vehicles Department. What was done by the Central Government was only the prescription of minimum qualifications, leaving the field open to the State Government concerned to prescribe if it finds necessary, higher qualifications. The Governor has been given power under proviso to Article 309 of the Constitution, subject .

to any law made by the State Legislature, to make rules regulating the recruitment which includes prescription of qualifications for appointment to an office or post under the State. Since the Transport Department under the Act is constituted by the State Government and the officers appointed to those posts belong to the State service, while appointing its own officers, the State Government as a necessary adjunct is entitled to prescribe qualifications for recruitment or conditions of service. But while so prescribing, the State Government may accept the qualifications or prescribe higher qualification but in no case prescribe any qualification less than the qualifications prescribed by the Central Government under sub-

section (4) of Section 213 of the Act. In the latter event, i.e., prescribing lesser qualifications, both the rules cannot operate without colliding with each other. When the rules made by the Central Government under Section 213(4) and the statutory rules made under proviso to Article 309 of the Constitution are construed harmoniously, there is no incompatibility or inconsistency in the operation of both the rules to appoint fit persons to the posts or class of officers of the State Government vis-a-vis the qualifications prescribed by the Central Government under subsection (4) of Section 213 of the Act.

21. While placing reliance upon its earlier judgments rendered in *J. Ranga Swamy v. Govt of AP* (1990) 1 SCC 288 and *PU Joshi v.*

Accountant General (2003) 2 SCC 632, Hon'ble Apex Court in *Chandigarh Administration through the Director Public Instructions (Colleges), Chandigarh v. Usha Kheterpal Waie and Ors* (2011) 9 SCC 645, again reiterated that it is for the rule-making authority or the .

appointing authority to prescribe the mode of selection and minimum qualification for any recruitment. Courts and tribunals can neither prescribe the qualifications nor entrench upon the power of the concerned authority 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 Constitution, statute and Rules.

"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. Courts and tribunals can neither prescribe the qualifications nor entrench upon the power of the concerned authority 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 Constitution, statute and Rules. [See J.Rangaswamy vs. Government of Andhra Pradesh - 1990 (1) SCC 288 and P.U. Joshi vs. Accountant General - 2003 (2) SCC 632]. 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 Ph.D. is unreasonable.

22. It is quite apparent from the aforesaid exposition of law as has .

been taken note herein above, that State/employer is well within its right to prescribe the mode of recruitment and qualification and other service conditions and in case, same are in violation of constitutional mandate or any other central legislation, same can be interfered with.

23. Consequently, in view of the detailed discussion made herein above, as well as law laid down by the Hon'ble Apex Court, this Court finds no merit in the present petitions and accordingly, same are dismissed being devoid of any merits.

13th October, 2022
(manjit)

(Sandeep Sharma),
Judge