**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 30.11.2012**

**BEFORE**
**THE HON'BLE SAEED-UZ-ZAMAN SIDDIQI, J.**

Rent Control No. - 1 of 2012

**Abdul Sattar Beg ...Petitioner**
**Versus**
**The Judge Small Causes Court Lko. and another ...Respondents**

**Counsel for the Petitioner:**
Sri Mohammad Naseerullah

**Counsel for the Respondents:**
Sri Manish Kumar
Sri Mohd. Aslam Khan

**U.P. Urban Building (Letting or Rent Control) Act 1972-Section 34 (1) (a)- Right to cross examination-proceeding under Section 21 (1) (a) summery in nature-to be decide on basis of affidavit of parties-one who seeks cross-examination has to be determined by affidavits the extraordinary circumstances and reasons for cross-examination-can not be used as tool for delaying the proceeding.**

**Held: Para-5**

**While praying for cross-examination, the party seeking cross-examination must show something extraordinary, which cannot be rebutted by the counter affidavit. In cases, under the Act, where the legislature has specifically provided that the evidence is to be led through affidavits, the shifting from normal course must be based upon cogent reasons.**

**Case Law discussed:**
[ARC 1997 (2) 674]; [AIR 1967 Sc 122]; [1989 (1) ARC 407]; [1998 (1) ARC 334]; [2005 (2) ARC 764]

(Delivered by Hon'ble Saeed-Uz-Zaman Siddiqi, J.)

1. By means of this writ petition, the petitioner / tenant has sought for writ in the nature of certiorari, quashing the order dated 16.11.2011 passed by learned Judge, Small Causes Courts (Prescribed Authority) in P.A. case No. 5 of 2010 and for issuance of writ in the nature of mandamus commanding the landlady (O.P. No. 2) to produce all the five witnesses for cross-examination.

2. Heard learned counsel for both the parties and have gone through the records.

3. Brief facts, relevant for the purposes of deciding this writ petition are that O.P. No. 2 is admittedly the landlady of the disputed premises, of which the petitioner is the tenant. The landlady moved application under Section 21 (1) (a) of U.P. Act. XIII of 1972 *(hereinafter referred to as "the Act").* The petitioner (tenant) filed written statement and both the parties filed affidavits, in evidence and the case was fixed for hearing of arguments. The landlady (O.P. No. 2) filed evidence of five witnesses. After a lapse of about a year, the tenant moved application under Section 34 (1) (a) of the Act for cross-examination of all the five witnesses, which has been mentioned that the landlady has filed her affidavit on 11.08.2010. Counter affidavit and Rejoinder Affidavits were exchanged between the parties. In the application paper No. 37 C, the tenant, who is the petitioner before this Court has submitted that the landlady is not in the need of the shop, in question and she has concealed very important facts about ownership of her properties as she is the richest person

in respect of the landed and built properties in Lucknow, especially in Hazratganj area. All the allegations contained in application paper No. 37 C are vague and just to delay the disposal of the case.

4. Though, there is a provision to permit cross-examination of the deponent, but this power has to be exercised only when such cross-examination is absolutely necessary. The party, seeking such permission has to show reasons for cross-examination.

5. While praying for cross-examination, the party seeking cross-examination must show something extraordinary, which cannot be rebutted by the counter affidavit. In cases, under the Act, where the legislature has specifically provided that the evidence is to be led through affidavits, the shifting from normal course must be based upon cogent reasons.

6. A Division Bench of this Court in ***Khushi Ram Dedwal v. Additional Judge, Small Causes Court/Prescribed Authority, Meerut and Ors. [ARC 1997 (2), 674],*** has held as under:-

*"The principle that a party is to be permitted to cross-examine on the principle of natural justice cannot be accepted in every case. Oral examination in all cases is not contemplated. Even in disciplinary inquiries in exceptional cases oral evidence may not be insisted upon as held in Hira Nath Mishra v. Principal, Rajendra Medical College, AIR 1973, SC 1260, and State of Haryana v. Rattar Singh, AIR 1977 SC 1512. If a party wants to cross-examine, he has to give the necessary facts in the application as to why the cross-examination is necessary. The Prescribed Authority will give the reasons either for allowing or refusing the cross-examination. The reasons disclosed in the order of the Prescribed Authority will show whether he acted fairly or not. Considering every aspect of the matter the authority under the provisions of U.P. Act No. 13 of 1972 can permit the cross-examination of a deponent of an affidavit only when it is necessary in the case."*

7. In the State of ***Jammu and Kashmir and ors. v. Bakshi Gulam Mohammad and another [AIR 1967 Sc 122],*** the Hon'ble Apex Court has observed that the primary objective of the Act is expeditious disposal of cases. It may be surrendered if the parties are permitted to lead oral evidence.

8. In the case of ***Smt. Gulaicha Devi v. Prescribed Authority (Munsif) Basti and another [1989 (1) ARC 407],*** the following observation was made:-

*"If oral evidence was contemplated to be filed and if the deponent of every affidavit was permitted to be cross-examined then it would not be possible to decide the release application under Section 21 (1) of the Act within a period of one months."*

9. In ***Kripal Singh v. Prescribed Authority, Haldwani, District- Nainital [1998 (1) ARC 334,*** the same view has been reiterated. In ***Fahmida Shoeb (Smt.) v. Kanhaiya Lal and another [2005 (2) ARC 764],*** this court has relied upon the authority has laid down in ***Gulaicha Devi's case (supra)***, and has reiterated the same view, which is as under;-

*"The consistent view of this Court, consequently, is that the normal mode of proceeding in a case under the Act is to receive evidence on affidavits from both the parties and to decide the case on the basis of the said affidavits. It is only in a very rare case where the Court thinks fit necessary in the interest of justice cross-examine a particular deponent of an affidavit, but it has to be very sparingly exercised in very exceptional circumstances, if such a power is exercised, specific reasons for exercise of the powers have to be given by the authority concerned. The cross-examination cannot be ordered as a matter of course."*

10. In view of the law as discussed above, it is clear that the proceedings under Section 21 (1) of the Act are of summary nature, by which the prescribed authority holds an enquiry which have to be dealt with.

11. The impugned order is perfectly in accordance with law on the point. The learned Prescribed Authority has rightly observed that vague application has been given, by which all the five witnesses have been sought to be examined and the application has been moved at the stage of arguments, after a lapse of a considerable period just to delay the disposal of the case which deserves to be decided within two months as provided by Rule 15 (3) of the rules framed under the Act.

12. The present application has been given by the petitioner with an intent to delay the proceedings and the tenant has dragged the landlady into the controversy up to this Court.

13. In view of the above, the writ petition is dismissed.

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**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 12.10.2012**

**BEFORE**
**THE HON'BLE RAJES KUMAR, J.**

Civil Misc. Writ Petition No. 109 of 1998

**Virendra Singh Yadav ...Petitioner**
**Versus**
**Collector, Ghazipur and others ...Respondents**

**Counsel for the Petitioner:**
Sri Prakash Padia

**Counsel for the Respondents:**
C.S.C.

**<u>Constitution of India, Article 226-</u> termination order-appointment on class 4th post-without advertisement, without constituting selection committee-de-horse the rules-plea regarding opportunity of hearing-not available-as before this court material do not disclose how termination order is faulty-working on strengthen of interim order-not helpful-after dismissal of Writ Petition-interim order nonest-petition dismissed.**

**Held: Para-11 and 12**

**Thus, it is apparent that the appointment of the petitioner was without following the Rules. The appointment of the petitioner was motivated by extraneous consideration and as a result of favouritism. The petitioner is not able to justify his appointment under the Rules. In the appointment letter itself it was made clear that the appointment of the petitioner was wholly temporary and could be terminated without any prior notice. Therefore, even if the termination order has been passed without giving any opportunity to the petitioner, the**

**same cannot be said to be illegal. The petitioner has fullest opportunity in this Court to assail the impugned order on merit but the petitioner could not do so and made no submission in this regard. Merely because the petitioner has worked under the interim order of this Court, the petitioner's appointment cannot be justified and the petitioner cannot be allowed to continue. The illegal appointment of the petitioner has taken away the rights of the several persons, who were also entitled for the appointment and could be better candidates but they were deprived to exercise their rights. Therefore, in such a situation, the petitioner is not entitled for any equitable considerable.**

**In my view, the initial appointment of the petitioner is de horse to the Rules, the equity has no role and on equitable consideration the petitioner cannot be allowed to continue on the ground that he has worked for long period under the interim order of this Court. It would amount to encourage the illegal appointments, depriving the right of the legitimate candidates.**

**Case Law discussed:**
2006 (4) SCC-1; 1997 (4) SCC 388: AIR 1997 SC 3071; 2003 (8) SCC 648: (AIR 2003 SC 4482); AIR 1968 Allahabad; JT 2009 (2) SC 520

(Delivered by Hon'ble Rajes Kumar, J.)

1. Heard Sri Prakash Padia, learned counsel for the petitioner and Sri Pankaj Rai, learned Additional Chief Standing Counsel for the respondents.

2. By means of the present writ petition, the petitioner is challenging the order dated 29.12.1997 passed by the District Magistrate, Ghazipur whereby the appointment of the petitioner has been cancelled and the services of the petitioner has been dispensed with. The petitioner has been appointed by the appointment letter dated 29.8.1997 issued by the then District Magistrate, Ghazipur appointing the petitioner on the post of Peon which had fallen vacant on the retirement of one Sri Purshottam Yadav temporarily till the regular appointment. In the appointment letter it was stated that the appointment was only temporary and could be terminated without any prior information.

3. It appears that in respect of the appointment of the petitioner, several complaints have been received by the then District Magistrate, Ghazipur. On the complaint, he has appointed Sub-Divisional Magistrate,Saidpur, Ghazipur to make necessary inquiry. The Sub-Divisional Magistrate,Saidpur, Ghazipur submitted the inquiry report on 21.11.1997 stating following irregularities in the appointment :

A. In accordance to Rule 19 of the U.P. Group D Employees Service Rules, 1985 (as amended) the vacancy has neither been notified to the Employment Exchange nor published in the newspaper nor the applications have been invited through Notice Board;

B. For the appointment of one vacant post of Peon only one application of the petitioner has been received and he has been appointed;

C. In accordance to Regulation Selection Committee would have been constituted but no Selection Committee has been constituted and no interview has been taken by the Selection Committee.

4. The District Magistrate, Ghazipur on the basis of the inquiry report, in the impugned order, has stated that for one vacant post application has been directly

received and the petitioner has been appointed and accordingly the appointment is contrary to Rules 1985 made in accordance to Article 309 of the Constitution of India and accordingly the appointment of the petitioner has been cancelled and his services have been dispensed with.

5. Learned counsel for the petitioner submitted that the petitioner has been appointed on 29.8.1997. The service of the petitioner has been dispensed with on 29.12.1997 against which the petitioner filed the writ petition which has been entertained and vide order dated 8.1.1998 the operation of the order dated 29.12.1997 has been stayed and since then the petitioner is continuously working and is getting salary and, therefore, on equitable consideration, the petitioner may be allowed to continue. He submitted that the impugned order has been passed without giving any opportunity and in violation of the principle of natural justice. He further submitted that on the validity of the appointment of the petitioner he cannot say anything. In support of the contention, learned counsel for the petitioner relied upon the decision of the Apex Court in the case of ***Shrawan Kumar Jha Vs. State of Bihar, reported in 1991-AIR (SC) 309***, the division Bench decision of this Court in the case of ***Girish Chandra and others vs. Union of India and others, reported in 1985 UPLBEC 22*** and the decision of the learned Single Judge of this Court in the case of ***Ratnakar Chaubey vs. Deputy Director of Education Vth Region, Varanasi and others, reported in 2004 E.S.C. Allahabad 262.***

6. Learned Additional Chief Standing Counsel submitted that the appointment of the petitioner was wholly temporary and in the appointment letter, it was clearly stated that the service of the petitioner could be terminated without giving any prior notice. The appointment of the petitioner was on the face of it was illegal and was made without following procedure of appointment given in Group D Employees Service Rules, 1985. It is apparent that the appointment was made by manipulation and on extraneous considerations. As required under Rule 19 of the Rules, 1985 the vacancy had not been notified to the Employment Exchange. No publication was made in the newspaper nor in the notice Board and as Required under Rule 16, the Selection Committee has not been formed only the petitioner's application has been entertained and the petitioner has been appointed. The appointment letter was directly handed over to the petitioner on 1.9.1997. The petitioner has been allowed to join on the same day. Neither any medical examination nor any verification of the antecedent of the petitioner was made before his joining. The appointment was wholly motivated by extraneous consideration and in such a situation the appointment has rightly been cancelled. In the petition, the petitioner is not able to justify his appointment in accordance to law. Despite the appointment of the petitioner was wholly illegal de horse to the Rules, the petitioner is working on the basis of the interim order granted by this Court. The petitioner has got his appointment by manipulation taking away the right of appointment of the several persons. Therefore, the petitioner is not entitled for the benefit of equity.

7. I have considered the rival submissions and perused the records.

8. Rules 19 and 16 of the Group 'D' Employees Service Rules 1985 reads as follows:

**19. Procedure for Selection. -** (1) The appointing Authority shall determine the number of vacancies to be filled during the course of the year as also the number of vacancies to be reserved for the candidates belonging to the Scheduled Castes, Scheduled Tribes and other categories. The vacancy shall be notified to the Employment Exchange. The Appointing Authority may also invite application directly from the persons who have their names registered in the Employment Exchange. For this purpose, the Appointing Authority shall issue an advertisement in a local daily newspaper besides posting the notice for the same on the notice board. All such applications shall be placed before the Selection Committee.

(2) When the names both of the general candidates and reserve candidates for whom vacancies are required to be reserved under the orders of the Government have been received by the Selection Committee it shall interview and select the candidates for various posts.

(3) In making selection the Selection Committee shall give weightage to the retrenched employees awarding marks in the following manner :

(i) For the first complete year ....5 marks.

(ii) For the next and every completed year of service .....5 marks.

9. Provided that the maximum marks awarded to a not trenched employee under this sub-rule shall not exceed 15 marks.

(4) The number of the candidates to be selected will be larger (but not larger by more than 25 per cent) than the number of vacancies for which the selection has been made. The names in the selection list shall be arranged according to the marks awarded at the interview.

**16. Constitution of Selection Committee.** -For the purpose of recruitment to any post, there shall be constituted a Selection Committee as follows:

(1)Appointing Authority;

(2)An officer belonging to Scheduled Caste/Scheduled Tribe, nominated by the District Magistrate if the Appointing Authority does not belong to Scheduled Caste/Scheduled Tribe. If the Appointing Authority belongs to Scheduled Caste/Scheduled Tribe, an office other than belonging to Scheduled Caste, Scheduled Tribe, Minority Community and Backward Class to be nominated by the District Magistrate;

(3)Two officers nominated by the Appointing Authority, one of whom shall be an officer belonging to Minority Community and the other to backward class. If such suitable officers are not available in his department or organization, such officers shall on the request of the Appointing Authority, be nominated by the District Magistrate and on his failure to do so, by reason of non-availability of suitable officers, such officers shall be nominated by the Divisional Commissioner.

Rule 19 (1) provides that the Appointing Authority shall determine the number of vacancies to be filled during the course of the year as also the number of vacancies to be reserved for the candidates belonging to the Scheduled Castes, Scheduled Tribes and other categories and shall notify the vacancy to the Employment Exchange and may also invite application directly from the persons who have their names registered in the Employment Exchange and in this regard the Appointing Authority shall issue an advertisement in a local daily newspaper besides posting the notice for the same on the notice board. All such applications shall be placed before the Selection Committee. Thereafter, the Selection Committee shall interview and select the candidates for various posts. Rules 16 provides for constitution of the Selection Committee, consisting of the Appointing Authority, an officer belonging to the Scheduled Caste and Scheduled Tribe and one officer belonging to the minority community.

10. In the present case neither any Selection Committee has been constituted nor the petitioner has been interviewed. The Procedure contemplated under Rule 19 has also not been followed. Only one application of the petitioner has been entertained on which the petitioner has been appointed.

11. Thus, it is apparent that the appointment of the petitioner was without following the Rules. The appointment of the petitioner was motivated by extraneous consideration and as a result of favouritism. The petitioner is not able to justify his appointment under the Rules. In the appointment letter itself it was made clear that the appointment of the petitioner was wholly temporary and could be terminated without any prior notice. Therefore, even if the termination order has been passed without giving any opportunity to the petitioner, the same cannot be said to be illegal. The petitioner has fullest opportunity in this Court to assail the impugned order on merit but the petitioner could not do so and made no submission in this regard. Merely because the petitioner has worked under the interim order of this Court, the petitioner's appointment cannot be justified and the petitioner cannot be allowed to continue. The illegal appointment of the petitioner has taken away the rights of the several persons, who were also entitled for the appointment and could be better candidates but they were deprived to exercise their rights. Therefore, in such a situation, the petitioner is not entitled for any equitable considerable.

12. In my view, the initial appointment of the petitioner is de horse to the Rules, the equity has no role and on equitable consideration the petitioner cannot be allowed to continue on the ground that he has worked for long period under the interim order of this Court. It would amount to encourage the illegal appointments, depriving the right of the legitimate candidates. Reliance is placed on the Constitution Bench decision of the Apex Court in the case ***Secretary, State of Karnataka and others Vs. Uma Devi (2) and others, reported in 2006 (4) SCC-1.*** I have perused the decision of the Apex Court in the case of ***Shrawan Kumar Jha Vs. State of Bihar*** (supra). The fact of such case was entirely different. In the said case, the appointments have been cancelled because the District Superintendent of Education had no authority to make the appointments while the same has been

disputed by the petitioner and in such a situation the Apex Court has held that before cancelling the appointment, opportunity should be given. In the case of ***Girish Chandra and others vs. Union of India and others*** (supra), it is not clear that what was the condition of the appointment and the allegation was that the termination was not in accordance with the terms and conditions of their services. The case of ***Ratnakar Chaubey vs. Deputy Director of Education Vth Region, Varanasi and others*** (supra) the facts of the case are entirely different and is not applicable to the present case.

13. ***In Committee of Management Arya Nagar Inter College v. Sri Kumar Tiwari, 1997 (4) SCC 388: AIR 1997 SC 3071***, the services of the respondent came to be terminated on 30th June, 1988, whereafter he obtained interim order and continued thereunder. Thus, he continued in service not by virtue of his own right under an order of appointment, but on account of interim order and the Court, thus, held that no benefit of such continuance can be allowed. **In South Eastern Coalfields Ltd. vs. State of M.P. And others, 2003 (8) SCC 648: (AIR 2003 SC 4482)**, the Court recognized the principle that wrong order should not be perpetuated by keeping it alive. Recognizing the maxim auctus curiae neminem gravabit, it was held that no one shall suffer by an act of the Court and such a rule is not confined to an erroneous act of the Court but act of the Court embraces within its purview all such acts as to which the Court may form an opinion in any legal proceedings that the Court would not have so acted had it been correctly apprised of the facts and law. It is duty of the Court to apply the restitution putting the parties in the same position as they would have been, had the order, subsequently found to be erroneous by the Court, would not have been passed. In para 28 of the judgment, it was held (para 26 of AIR).

**"The injury, if any, caused by the act of the Court shall be undone and the gain which the parties would have earned unless it was interdicted by the order of the Court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Court persuading the Court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced." (emphasis added)**

14. Considering from another angle, where an interim order is passed and the writ petition is ultimately dismissed, the effect would be as if no order was ever passed. That being so, the incumbent does not gain on the basis of mere continuance since he has no legal or valid right to continue. An interim order passed by the Court merges with the final order and, therefore, the result brought by dismissal of the writ petition is that the interim order becomes non est.

15. ***A Division Bench of this Court in Shyam Lal v. State of U.P., AIR 1968 Allahabad*** , while considering the effect of dismissal of writ petition on interim order passed by the Court has laid down as under:

**"It is well settled that an interim order merges in the final order and does not exist by itself. So the result brought about by an interim order would be non est in the eye of law if the final final order grants no relief. The grant of interim relief when the petition was ultimately dismissed could not have the effect to postponing implementation of the order of compulsory retirement. It must in the circumstances take effect as if there was no interim order."**

16. The same principle has been reiterated in the following cases:

(A) AIR 1975 Allahabad 280, Sri Ram Charan Das v. Pyare Lal.

"In Shyam Lal v. State of U.P., AIR 1968 All 139, a Bench of this Court has held that orders of stay or injunction are interim orders that merge in final orders passed in the proceedings. The result brought about by the interim order becomes non est in the eye of law if final order grants no relief. In this view of the matter it seems to us that the interim stay became non est and lost all the efficacy, the Commissioner having upheld the permission which became effective from the date it was passed."

(B) 1986 (40 LCD 196, Shyam Manohar Shukla v. State of U.P.

"It is settled law that in interim order passed in a case which is ultimately dismissed is to be treated as not having been passed at all (see Shyam Lal v. state of Uttar Pradesh, Lucknow), AIR 1968 Allahabad 139 and Sri Ram Charan Das v. Pyare Lal, AIR 1975 Allahabad 280 (DB)."

(C) AIR 1994 Allahabad 273, Kanoria Chemicals & Industries Ltd. v. U.P. State Electricity Board. (Para 7).

"After the dismissal of the writ petitions wherein notification dated 21-4-1990 was stayed, the result brought about by the interim orders staying the notification, became non est in the eye of law and lost all its efficacy and the notification became effective from the beginning."

17. In the case of ***Raghavendra Rao Etc. v. State of Karnataka and others, etc., reported in JT 2009 (2) SC 520,*** the Apex Court held as follows:

18. It is now a well-settled principle of law that merely because an employee had continued under cover of an order of Court, he would not be entitled to any right to be absorbed or made permanent in the service . This Court in **Uma Devi (3)** (supra), held as under :

**"Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme**

**for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of the temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas the interim direction to continue his employment would hold up the regular procedure for selection or imposed on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."**

19. Recently in **Official Liquidator v. Dayanand & Ors.** [JT 2008 (11) SC 467 ; 2008 (10) SCC 1], this Court has reiterated the same view.

20. In the facts and circumstances, stated above, I do not find any merit, which requires interference by this Court. On the facts and circumstances, I direct the District Magistrate to make inquiry that who are the persons involved in such illegal appointment and necessary action be taken against them.

21. In the result, the writ petition fails and is dismissed with costs of Rs.25,000/-.

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**REVISIONAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 06.11.2012**

**BEFORE**
**THE HON'BLE SAEED-UZ-ZAMAN SIDDIQI, J.**

Civil Revision No. 118 of 2012

**Oriental Insurance Comp. Ltd. Lko.Throu Its Manager ...Petitioner**
**Versus**
**Smt. Vijay Laxmi and others ...Respondents**

**Counsel for the Petitioner:**
Sri Waquar Hashim

**Counsel for the Respondents:**
.....

**Code of Civil Procedure-Section 115-revision-maintainability against order rejecting amendment application by accident claim Tribunal-being interlocutory in nature-revision-held-not maintainable.**

**Held: Para-8**

**In view of the above, revision is not maintainable and deserves to be dismissed. However it is made clear that the Hon'ble Apex Court in the case of National Insurance Co. Ltd. v. Swaran Singh and others, (2004) 3 SCC 297 and in many other cases has repeatedly held that if the person driving a motor vehicle, at the time of accident, was not having a valid driving licence, the insurance company has to compensate the claimant, with a right to recover it from the owner.**

**Case Law discussed:**
AIR 1966 SC 153; AIR 2002 SC 559; AIR 2003 SC 2434; (2004) 3 SCC 297

(Delivered by Hon'ble Saeed-Uz-Zaman Siddiqi, J.)

1. By means of this revision petition, the revisionist has prayed for setting aside order dated 17.09.2012, passed by the Motor Accident Claims Tribunal (Additional District Judge), Barabanki, in MACT Case no.91 of 2009.

2. Heard learned counsel for the revisionist and perused the record.

3. Brief facts of the case are that one Smt. Vijay Laxmi (opposite party no.1) filed the claim petition against the revisionist and opposite party no.4 and 5. The revisionist / insurance company filed written statement on 9.9.2011, which was prepared on 24.06.2011. The case proceeded by the Tribunal and evidence was concluded, arguments were heard and 24.08.2012 was fixed for delivery of judgment. The Insurance Company moved amendment application paper no.60-B for addition of plea regarding driving licence, which has been rejected by the learned Court below.

4. The amendment has been sought at a belated stage and no explanation for moving amendment application after such a long delay has been given by the revisionist. In view of this fact the learned Tribunal rightly observed that the amendment application has been moved with intention to delay the disposal of the case, which is malafide.

5. The Hon'ble Apex Court in the case of ***Pandurang Dhondi Chougule and others Vs. Maruti Hari Jadhav and others,*** reported in ***AIR 1966 SC, 153*** has held as under:-

*".....It is well-settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the Court, which tries the proceedings. A finding on these pleas in favour of the party*

*raising them would oust the jurisdiction of the Court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code. But an erroneous decision on a question of law reached by the subordinate Court which has no relation to questions of jurisdiction of that Court, cannot be corrected by the High Court under Section 115."*

6. This view has been reiterated by the Hon'ble Apex Court in ***Prem Bakshi v. Dharam Deo,*** reported in ***AIR 2002 SC 559.*** Again in Gayatri Devi and others v. Shashi Pal Singh reported in 2005 (2) AWC 1072 (SC), it was held that revision under Section 115 of the Code of Civil Procedure is not maintainable against an interim order.

7. In Shiv ***Shakti Co-op. Housing Society, Nagpur v. M/s Swaraj Developers and others,*** reported in ***AIR 2003 SC 2434,*** it was held:-

*"It is fairly a well settled position in law that the right of appeal is a substantive right. But there is no such substantive right in making an application under S. 115. Section 115 is essentially a source of power for the High Court to supervise the subordinate courts. It does not in any way confer a right on a litigant aggrieved by any order of the subordinate court to approach the High Court for relief. The scope for making a revision under S. 115 is not linked with a substantive right."*

8. In view of the above, revision is not maintainable and deserves to be dismissed. However it is made clear that the Hon'ble Apex Court in the case of ***National Insurance Co. Ltd. v. Swaran Singh and others, (2004) 3 SCC 297*** and in many other cases has repeatedly held that if the person driving a motor vehicle, at the time of accident, was not having a valid driving licence, the insurance company has to compensate the claimant, with a right to recover it from the owner.

9. In view of the settled law on the point, the learned Tribunal shall take into consideration while preparing the award and even when the execution is moved. This aspect can well be considered by the Tribunal at subsequent stages as mentioned hereinabove.

10. With these observations, revision petition is dismissed in limine.

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**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 01.10.2012**

**BEFORE**
**THE HON'BLE PRAKASH KRISHNA, J.**
**THE HON'BLE ARVIND KUMAR TRIPATHI (II), J.**

First Appeal From Order No. - 248 of 2002

**The New India Assurance Co.Ltd., Bareilly ...Petitioner**
**Versus**
**Smt. Usha Devi (Kumari) and others ...Respondents**

**Counsel for the Petitioner:**
Sri Rakesh Bahadur

**Counsel for the Respondents:**
Sri R.K. Misra
Sri B.D. Sharma
Sri R.A. Shukla
Sri R.N. Maurya
Sri Radha Mohan Pandey
Sri Sudhir Kr. Srivatava

**Workman's Compensation Act, Section 30-Appeal by insurer against award of commissioner-on ground although**

**Tractor involve in accident bears comprehensive insurance-but except the driver-owner-insurer's no liability-admittedly both deceased labor employed for loading sugarcane by the owner vehicle-can not be termed as stranger-commissioner rightly fixed liability upon the appellant-after verification of record-no interference called for-appeal dismissed.**

**Held: Para-25 and 27**

**In view of the fact that the insurance policy in the present case being comprehensive insurance it would cover all risk insurance except loss caused by fraudulent act by the insured. The burden was upon the insurer to produce copy of insurance policy to show that the case on hand, was under the except clause, if any. It was neither pleaded nor proved by the insurer that they are not liable to compensate the claimants notwithstanding the fact that it is a case of comprehensive insurance.**

**The upshot of the above discussion is that the appellant is liable to satisfy the award passed by the Workmen's Compensation Commissioner and to indemnify the insured person.**

**Case Law discussed:**

1994 (1) T.A.C. 679; 2007 (3) T.A.C. 895 (H.P.); 2003 (2) T.A.C. 849 (Ker.); 2006 (1) T.A.C. 321; (2007) 13 SCC 446; JT 1998 (2) SC 484

(Delivered by Hon'ble Prakash Krishna, J.)

1. These two appeals filed under Section 30 of Workmen's Compensation Act were heard together and are being disposed of by a common judgment. Learned counsel for the parties jointly stated that common questions of law and facts are involved in both the appeals.

2. Tractor bearing registration no. UP-25-B/8706 owned by the respondents no. 2 to 4 jointly was insured with the present appellant for own goods. The owners had employed two labourers, namely, Rakesh Kumar S/o Buddh Sen and Rakesh Kumar s/o Bihari Lal. The owners on 25th November, 1995 send the tractor along with aforesaid two labourers to bring sugarcane and when the tractor reached on Brijpuri railway crossing, a coming train hit the tractor which caused fatal injuries to aforesaid two labouers. They died during the course of employment and each one of them was getting Rs.1,800/- per month as wages. This led to filing two claim petitions being Case Nos. 49/WCA/99 and 50/WCA/99 before the Workmen's Compensation Commissioner.

3. Therein, besides the owners, Insurer-appellant herein were impleaded as respondents in the claim proceedings. They contested the claim petitions by filing separate replies. It was not disputed by the Insurance Company that the tractor in question was not insured with them on the fateful day. They came out with the case that the driver of the tractor was not holding valid and effective driving license. The insurance policy covers the risk of paid driver of the tractor only and it does not cover the risk of labourers of the said tractor. It was further pleaded that registration certificate of the vehicle in question would show that the sitting capacity of the said vehicle is only one.

4. The claimants led evidence in support of their claim petitions. They were cross examined by the Insurer. The Workmen's Compensation Commissioner has awarded a sum of Rs.2,01,600/- in Case Nos. 49/WCA/99, Smt. Usha Devi versus M/s New India Insurance Co. Ltd. and others and Rs.1,90,61/- in Case No. 50/WCA/99, Smt. Shakuntala Devi versus

M/s New India Insurance Co. Ltd. and others as compensation amounts.

5. Shri Rakesh Bahadur, learned counsel for the appellant submitted that Insurer is not liable to indemnify the owners of the tractor as two labourers were unauthorizedly travelling in the tractor. Tractor was being driven against terms of insurance policy. He also submitted that the tractor is 'goods vehicle' and insurer is not liable to pay compensation in respect of such labourers whose risk was not covered under insurance policy. It was also submitted that the registration certificate of the insurance policy of the tractor itself shows that the sitting capacity of the said vehicle was only one and accordingly the insurer took insurance of one paid driver amounting to Rs.15/- only which is mentioned in the insurance policy.

6. In reply, learned counsel for the claimants submitted that the insurance policy was a comprehensive insurance policy as found by the Workmen's Compensation Commissioner also, the insurer is liable to pay compensation amount to the claimants notwithstanding anything. Accident occurred during the course of employment and the labourers were on duty on the fateful day. These two unfortunate labourers were in the tractor. They were on duty and were carrying out the order of their employer to bring sugarcane on the tractor. It was also submitted that only such pleas are available to the insurer which are available to the owners under the Workmen's Compensation Act.

7. Considered the respective submissions of the learned counsel for the parties and perused the record.

8. At the very outset, it may be noted that on the pleadings of the parties, Workmen's Compensation Commissioner had framed six issues for determination. All issues have been decided in favour of the claimants-respondents. The dispute sought to be raised in the present appeal is with regard to the liability of the insurer to indemnify the owners of the tractor. In this regard, issue no. 2 was framed before the Workmen's Compensation Commissioner and the findings returned thereunder are important. Issue no. 2 is to the effect— whether Tractor No. UP-B/8706 of the opposite parties no. 2 to 4 was validly insured with opposite party no. 1 the New India Assurance Co. Ltd., on the date of accident i.e. on 25th November, 1995. Under the said issue, it has been found that the tractor was validly insured with the appellant. To this extent, there appears to be no dispute between the parties. Contention of the insurer that only the risk of driver was insured, has been negatived on the finding that from the insurance cover in addition to the risk of driver, the person responsible for upkeep of the tractor were also covered under the insurance policy. This is the core issue for decision in these appeals.

9. Learned counsel for the appellant referred the following cases in support of proposition that there is no liability of insurance company in respect of death or injury to such persons who were travelling in a tractor. Tractor is a goods vehicle and in view of the provisions of Motor Vehicle Act, no liability could be fastened on the insurer for death of the person who was travelling in the tractor. The referred cases are as follows:

1. *New India Assurance Co. Ltd. versus Smt. Tarawati and others, 1994 (1) T.A.C. 679;*

2. *New India Assurance Company Ltd. versus Sudesh Kumari and others, 2007 (3) T.A.C. 895 (H.P.); and*

3. *National Insurance Co. Ltd. versus Kottam, 2003 (2) T.A.C. 849 (Ker.).*

10. All these decisions were rendered in regard to the claim petitions filed under the Motor Vehicles Act and were decided in the light of the provisions of that Act.

11. The said argument may hold good in a proceeding under the Motor Vehicle Act. To what extent such argument can be accepted in proceeding under Workmen's Compensation Act is a different question.

12. The Apex Court in the case of ***National Insurance Co. Ltd. versus Mastan and another,*** 2006 (1) T.A.C. 321, has considered the provisions of Motor Vehicle Act vis-a-vis Workmen's Compensation Act. It has noticed that Chapter-X of Motor Vehicle Act will have effect on the proceedings before Workmen's Compensation Commissioner notwithstanding anything contained in the provisions of the said Act or any other law for the time being enforced. Chapter-X of Motor Vehicle Act deals with liability without fault in certain cases. In para-14 of the report, it has been stated that Applicability of the provisions of the 1988 Act in a proceeding under the 1923 Act is confined to a matter coming within the purview of Chapter X only. It cannot be stretched any further. For the sake of convenience, paras-13 & 14 are reproduced below:

"13. Section 143 occurs in Chapter X of the 1988 Act. Section 144 contains a non-obstante clause stating that the provisions of the said chapter shall have effect notwithstanding anything contained in any other provisions of the said Act or of any other law for the time being in force. Chapter X deals with liability without fault in certain cases. Chapter X, therefore, will have no application in relation to a claim made in terms of Chapter XI of the 1988 Act.

14. Applicability of the provisions of the 1988 Act in a proceeding under the 1923 Act is confined to a matter coming within the purview of Chapter X only. It cannot be stretched any further."

13. It has been further laid down that an insurer, subject to the terms and conditions of contract of insurance, is bound to indemnify the insured under the Workmen's Compensation Act also under the Motor Vehicle Act. Keeping in view the nature and purport of the two statutes, the pleas which be raised by the insurer being different, the scope and ambit of appeal are also different. The relevant paras are reproduced below:

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

**22.** Under the 1988 Act, the driver of the vehicle is liable but he would not be liable in a case arising under the 1923 Act. If the driver of the vehicle has no licence, the insurer would not be liable to indemnify the insured. In a given situation, the Accident Claims Tribunal, having regard to its rights and liabilities vis-`-vis the third

person may direct the insurance company to meet the liabilities of the insurer, permitting it to recover the same from the insured. The 1923 Act does not envisage such a situation. Role of Reference by incorporation has limited application. A limited right to defend a claim petition arising under one statute cannot be held to be applicable in a claim petition arising under a different statute unless there exists express provision therefor. Section 143 of the 1988 Act makes the provisions of the 1923 Act applicable only in a case arising out of no fault liability, as contained in Chapter X of the 1988 Act. The provisions of Section 143, therefore, cannot be said to have any application in relation to a claim petition filed under Chapter XI thereof. A fortiori in a claim arising under Chapter XI, the provisions of the 1923 Act will have no application. A party to a lis, having regard to the different provisions of the two Acts cannot enforce liabilities of the insurer under both the Acts. He has to elect for one.

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

14. The ratio of the above pronouncement is that a claimant has an option to claim the compensation either under Motor Vehicle Act or under Workmen's Compensation Act but not under both Acts.

15. A person who has claimed compensation under no fault liability under Motor Vehicle Act cannot subsequently claim compensation in addition, under Workmen's Compensation Act. The claimant is put to election to choose either of them but not both. A reading of the above precedent, further shows that under two Acts, such defences which are available to insurer may not be available to such insurer if the proceedings are under Workmen's Compensation Act. To an insurer in a proceeding under the Workmen's Compensation Act, only such defences which are available to the owner would be available.

16. The aforesaid decision has been relied upon in ***Gottumukkala Appala Narasimha Raju and others versus National Insurance Company Limited and another,*** (2007) 13 SCC 446. In this case, after noticing its earlier judgment, the Apex Court in para-25 of the report has made the following observations:

"The ingredients for maintaining a proceeding under 1988 Act and 1923 Act are different. The purpose for which a contract of insurance is entered into may be different, whereas 1988 Act, it will bear repetition to state, a contract of insurance would be mandatory; for the purpose of applicability of the 1923 Act, it will be optional and as indicated hereinbefore, in Harshadbhai Amrutbhai Modhiya (supra), even contracting out is permissible, as under the 1923 Act, the liability of the insurer is limited to the claim of the workman. The liability under Section 147(2)(b) of the 1988 Act, on the other hand, extends to third party."

17. Section 147 of the Motor Vehicle Act, 1988 provides for requirements of

policies and limits of liability. For the sake of convenience, Section 147 of the Motor Vehicle Act, 1988 and its proviso is reproduced below which reads as follows:

"147. Requirements of policies and limits of liability.-- (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which--

(a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub- section (2)--

(i)against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii)against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required--

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen' s Compensation Act, 1923 , (8 of 1923 .) in respect of the death of, or bodily injury to, any such employee--

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as a conductor

of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation.-- For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any

property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub- section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely:--

(a) save as provided in clause (b), the amount of liability incurred;

(b) in respect of damage to any property of a third party, a limit of rupees six thousand:

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months

after such commencement or till the date of expiry of such policy whichever is earlier.

(3) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

(4) Where a cover note issued by the insurer under the provisions of this Chapter or the rules made thereunder is not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

18. A plain reading of the aforesaid proviso would show that the policy shall cover liability arisen under the Workmen's Compensation Act, 1923 in respect of death of, or bodily injury to, any such employee (i) engaged in driving the vehicle, or (ii) if it is a goods carriage, being carried in the vehicle.

19. Here, it is a case where deaths were caused due to use of Motor Vehicle and in the course of employment. The two persons were in the tractor in the course of their employments to bring the sugarcanes.

20. It has been found as a fact that these two unfortunate labourers were travelling in the tractor which is goods carriage for the purposes of loading of sugarcane on the instructions of their employer. This being so, the risk of injury or death caused to them in the course of employment would be covered under the insurance policy.

21. There is another angle also. We have examined the original record containing insurance cover. It is mentioned thereunder that the insurance policy is comprehensive policy, the fact which was also pleaded by the owners in their written statement. In the insurance cover, it is not mentioned that the policy is 'Act policy' instead it is 'Comp. Ins'. It implies that the insurance policy was comprehensive insurance policy, so also has been found by the Workmen's Compensation Commissioner. This being so, obviously the risk of lives of labourers and bodily injuries would also be covered under the insurance policy.

22. Learned counsel for the claimants argued out that 15% loading was charged. It is indicative of the fact that it was comprehensive policy. In reply, learned counsel for the insurer submits that it relates to tariff. Be that as it may, we are of the opinion that the insurance policy being comprehensive insurance policy, the risk of third party's injury and death are also covered . In other words, risk of the life of labourers

who were in the tractor in the course of their employment on instructions of their employer, were also covered and they would be treated as third party qua the owners of tractor.

23. 'Comprehensive Insurance' has been defined in Black's Law Dictionary 5th edition as 'All risk insurance' which in turn is defined as follows:-

" Type of insurance policy which ordinarily covers every loss that may happen, except by fraudulent acts of the insured. Miller v. Boston Ins. Co. 218 A. 2d 275, 278, 420 Pa. 566. Type of policy which protects against all risks and perils except those specifically enumerated."

24. The aforesaid definition has been reproduced by the Apex Court in the case of ***Amrit Lal Sood & another vs Smt. Kaushalya Devi Thapar & others,*** JT 1998 (2) SC 484. This is a decision rendered by three Hon'ble Judges delivered under the provisions of Motor Vehicle Act, 1939. The issue involved therein was whether the insurer, is liable to satisfy the claim for compensation made by a person travelling gratuitously in the car. The insurer had issued comprehensive insurance, insuring the car. The Court proceeded to decide this issue on the footing that the liability of the insurer in this case depends on the terms of the contract between the insured and the insurer as evident from the policy. In the case before us, insurer (appellant) has admitted that the tractor was insured with them. It has not filed the copy of insurance policy but we find copy of insurance certificate wherein against the column 'Limitation As To Use 'Comp. Ins.' have been mentioned.

25. In view of the fact that the insurance policy in the present case being comprehensive insurance it would cover all risk insurance except loss caused by fraudulent act by the insured. The burden was upon the insurer to produce copy of insurance policy to show that the case on hand, was under the except clause, if any. It was neither pleaded nor proved by the insurer that they are not liable to compensate the claimants notwithstanding the fact that it is a case of comprehensive insurance.

26. In the subsequent decision of the Apex Court in ***Oriental Insurance Co. Ltd. vs Cheruvakkara Nafeessu and others,*** JT 2001 (1) SC 341, the decision given in the case of Amrit Lal Sood (supra) has been noticed and considered. It has been held that insurer is liable to pay the entire award amount to the claimants. Upon making such payment the appellant can recover the excess amount from the insured by executing this award against the insured to the extent of such excess as per Section 174 of the Motor Vehicles Act, 1988.

27. The upshot of the above discussion is that the appellant is liable to satisfy the award passed by the Workmen's Compensation Commissioner and to indemnify the insured person.

28. Argument of the appellant is that the premium was paid for paid driver only and normally in the tractor except the driver there is no seat. Learned counsel for the appellant in this connection has filed a document as annexure-4 to the affidavit filed in support of the stay application. It is dated 20th February, 2002. It is R.C. Verification Report, Surveyor & Loss Assessor. The said

document should not have been referred by the appellant as it is not part of record of the Workmen's Compensation Commissioner as also it came into existence after award. The award is dated 20th December, 2001. In all fairness, the appellant should have sought permission of the Court to lead additional evidence in the appeals before referring the said document in the course of argument. The argument proceeded on the footing that the said document found part of record but on verification from the original record, we find that it is not so. We deprecate such practice.

29. Any other point was not pressed.

30. We do not find any merit in the appeals. Both the appeals are, hereby, dismissed with costs.

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**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 28.09.2012**

**BEFORE**
**THE HON'BLE PRAKASH KRISHNA, J.**
**THE HON'BLE ARVIND KUMAR TRIPATHI (II), J.**

First Appeal No. - 658 of 2005

**State of U.P. Thru' The Collector Bijnor and another ...Applicants**
**Versus**
**Ajay Singh and others ...Respondents**

**Counsel for the Petitioner:**
S.C.

**Counsel for the Respondents:**
Sri R.S. Mishra
Sri B.K. Mishra
Sri S.K. Srivastava

**<u>Indian Forest Act, 1927-Section-27-</u> land once reserved forest land-can be de-reserve only by Central Government notification-not by other process-suit for permanent injunction-without having any title-suit itself hit by provisions of Section 27-A.**

**Held: Para 66**

**It follows when a reserve forest has been established through notification, it shall cease to be a reserve forest only when there is a notification to this effect by the State Government in the official gazette and not by any other process. In the case on hand, we do not find any such notification on record. This being so, it is end of the matter, so far as the plaintiffs are concerned. The land in dispute continues to be reserve forest land and the suit is hit by section 27A, as added in State of U.P.**

(Delivered by Hon'ble Prakash Krishna, J.)

1. It is an unfortunate case. The facts of the case unveils how some government servants, here two officials, who were in possession of revenue record, as part of duty to protect the government land, colluded with each other to grab the government property by forging the revenue record and entered the names of their wives and sons who are plaintiffs herein. Thus, they caused an estimated loss to the extent of Rs.50 crores to the public exchequer as found in the inquiry report dated 11.4.2002.

2. This is defendants' appeal against the original judgment and decree dated 30th of May, 2005.

3. Present first appeal has been filed by the State of U.P. through Collector, Bijnor and Forest Range Officer, Amangarh Range, Bijnor against the judgement and decree dated 30.5.2005 and 8.7.2005, respectively, passed by the Additional Civil Judge (Senior Division),Bijnor by which the suit has been decreed being O.S. No. 545 of

1991 Ajay Singh son of Mahavir Singh, Abdullah son of Mohamood Khan, Smt. Akhtari daughter of Imamuddin and Smt. Nirmala Devi Daughter of Chhote Lal, all residents of village-Rani Nangala, Post Afzalgarh, Tehsil Nagina, District Bijnor. against State of U.P. through Collector, Bijnor and and Forest Range Officer, Amangarh, Range, Bijnor and directed defendants not to interfere in ownership and peaceful possession of plaintiffs over Plots No.24/2 to 24/5, 27/02, 28/1, 29 to 32 area 89 bigha, 18 biswa situated in village-Rani Nangala, district Bijnor.

4. From perusal of record, it transpires that the respondents herein filed the above mentioned civil suit for permanent injunction against the State of U.P. through Collector and Forest Range Officer, Amangarh, Bijnor alleging that they are owners in possession of the disputed plots. Defendant no. 2 has its office near that land and its employees are inimical to the plaintiffs. The plaintiffs are using the disputed plots by sowing and reaping the crops and defendants have no concern with the land. There were some trees in the disputed plots due to which they were feeling difficulty in using that portion of the land. So, they moved an application for permission to cut those trees on 20.3.1990 before **Prabhagiya, Van Adhikari** (Tarai, Pashchim Van Prabhag), Ram Nagar, who was the superior officer of defendant no. 2 and had power to grant permission. In this matter, defendant no. 2 was expecting some bribe from plaintiffs and due to non-fulfilment of that demand, they were inimical to them. The defendants threatened that neither they will permit them to cut the trees nor the plaintiffs will be permitted to use the land for agriculture purpose. Several letters were written for permission to cut the trees, though due to lapse of time, the permission deemed to be granted. On 5.7.1991, defendant no. 2 and other persons along with Police force came and demolished their Dera and took away other agricultural implements and hand-pump etc. Plaintiffs filed the suit without giving any notice under Section 80 CPC on the pretext that if notice is given, then the delay will defeat the purpose of suit and prayed for exemption from giving notice under Section 80 CPC. The plaintiffs after filing the suit, prayed that defendants be restrained from interfering in ploughing, sowing and reaping the crops and using the land and also be restrained from interfering in the possession of plaintiffs.

5. Defendants filed their written statements denying that plaintiffs are owners in possession or bhumidhar of the disputed land. They also denied that they are tenant of village-Rani Nangala because the disputed land along with other land has been declared reserved forest under Section 20 of Indian Forest Act and plaintiffs have no right to challenge the notification for that purpose. It was stated that disputed land is a forest land and is in control and possession of Forest Department. The standing trees are also property of the forest department. According to plaintiffs own admission, their illegal possession has been removed, hence, the suit is not maintainable. If at all, plaintiffs have got their names recorded by fraud or in-collusion of revenue personnel, then that entry has no value and the plaintiffs cannot claim any right due to that illegal and forged entry. The suit is not maintainable and it is barred by the provisions of Section 331 of U.P. Zamidari Abolition and Land Reforms Act (hereinafter referred to as the Act). The ownership of the plaintiffs is disputed, hence, without declaration of title the suit is not maintainable. Vide notification no. 147-

1926, dated 31.7.1928 under Section 20 of Indian Forest Act, the total area of village Rani Nangala which is 1484 acre has been declared reserved forest. Plaintiffs have not raised any objection against that notification, hence, the suit is barred. Plaintiffs were never in possession of the disputed land, so, the suit is barred by Section 20 of Indian Forest Act, Sections 35 and 41 Specific Relief Act and thus plaintiffs are not entitled to any relief. The suit is undervalued.

6. It is worthy to note that appellant had amended their written statement and added para-34-A in which it has been mentioned that vide letter no.30/7-Bhu-Lekh-H-10 Inquiry Dt.15.4.2002 of District Magistrate, Bijnor, the inquiry report has been sent to Prabhagiya Nideshak, Van Prabhag, Bijnor in which it has been found that certain persons have on forged documents got Rani Nangala village declared as a revenue village which was earlier forest land. It has also been stated that Mahadev Singh Malviya, Lekhpal, Amin of irrigation department Sri Mahmood Ahmad and the then A.R.K. Ghasita Singh have colluded and by creating forged revenue papers declared the forest land to be revenue village. The disputed land is forest land and plaintiffs have no concern with that land.

7. In their replication, plaintiffs have stated that Rani Nangala village was already a revenue village and no new revenue village has been created, revenue records cannot be changed and plaintiffs are Bhumidhars with transferable right.

8. Learned Additional Civil Judge, (Senior Division) after going through the pleadings framed the following issues:

(i) Whether plaintiffs are owner in possession of land Khasra Nos.24/2 to 25/5, 28/1,28/2,27/2, 29 to 32 area 89 bigha, 18 biswa, village Rani , Post Afzalgarh, Tehsil Nagina, District Bijnor and also of the trees therein? If so its effect.

(ii) Whether the disputed land has been declared for reserve forest under Section 20 of Indian Forest Act? if so its effect.

(iii) Whether plaintiffs are not in possession of the disputed land? If so its effect.

(iv) Whether civil court has no jurisdiction to try the suit as has been mentioned in para-26 of the written statement and whether the suit is barred by provisions of Section 331 of UPZA &LR Act?

(v) Whether the suit is barred by provisions of Section 38 and 41 Specific Relief Act as has been mentioned in para-33 of the written statement?

(vi) Whether the suit is barred by principles of estoppel and acquiescence? if so its effect.

(vii) Whether the suit is barred by time as has been pleaded in para-31 of the written statement, if so its effect.

(viii) Whether the suit is undervalued and the court fee paid is insufficient?

(ix) What reliefs, if any, are plaintiffs entitled?

9. In support of their claim, parties had filed several papers which shall be dealt with at the appropriate place. In addition to this, plaintiffs have examined Mohd. Akhtar

PW/1 and Hakim Singh as P.W. 2. Defendants have examined Abdul Sattar as D.W. 1. Learned lower court has after going through the evidence and documents, decreed the suit. Feeling aggrieved the defendants have filed this appeal.

10. We have heard learned Standing counsel for the State and Sri B.K.Mishra for the respondents.

11. It has been argued from the side of appellants that land in question is a reserved forest land. The Civil Judge (Senior Division) has no jurisdiction to hear the suit as it was barred by Section 331 of the UPZA & LR Act. The revenue entries in favour of the plaintiffs is a result of forgery and collusion with the employees of revenue department. Plaintiffs-respondents were never in authorized possession of the disputed land and were never recorded as tenure holder, anything contrary to this, is wrong. By notification no. 147-1926 dated 31.7.1928 made under Section 20 of Indian Forest Act, total area of about 1484 acres of village Rani Nangala has been declared forest land and since then the said land is in exclusive possession and ownership of the forest department. Later on, by another notification dated 27.1.1939, 150 acre land too of that village was declared forest land. The notifications dated 31.7.1928 and 27.1.1939 were never challenged. Hence, the suit is barred by principles of estoppel and acquiescence. The copies of khasras and khataunis pertaining to the land ownership and possession of the respondent are forged and fabricated and notifications dated 31.7.1928 and 27.1.1939 have overriding effects. The appellant had constituted an inquiry committee presided by Sub-Divisional Officer, Najibadad, Bijnor and six other members dated 26.3.2002. The Committee has submitted the inquiry report dated 11.4.2002 in which the committee has concluded that plaintiffs in collusion with revenue authorities have manipulated and obtained forged entries pertaining to the land in question. Appellant no. 1, after agreeing with the inquiry report, has already sent a letters dated 15.4.2002 with a specific direction to Prabhagiya Nideshak, Van Prabhag, Bijnor, which is on record. But learned court below has over looked the same in passing the decree.

12. Learned counsel for the respondents has argued that the agricultural land of the respondent was acquired for construction of 'pili dam' and 'Kalluwala dam', therefore, they were displaced and were deprived from their agricultural land. Thereafter, the Government issued an order being G.O. No. 3948 dated 30.6.1961 and some of the forest land was handed over to the Irrigation Department for rehabilitation of the displaced persons. For this purpose 352 acre land was given to the Irrigation Department. In view of the G.O. Dated 30.9.1961 and order dated 13th July, 1962 issued by the Chief Engineer, Irrigation Department, U.P., the Government Notification No. 731 dated 3.7.1928 and the Government Notification dated 27.1.1939 declaring the land of Rani Nangala reserved forest land under Section 20 of the Indian Forest Act has become insignificant and non-est. In view of this, right of the Forest Department over the property in question became extinct. The inquiry and action of the State Government was illegal, arbitrary and with mala fide intention and has no effect on the decision of the suit.

13. Refuting the arguments advanced by learned counsel for the respondents, learned Standing Counsel argued that plaintiffs-respondents have taken a simple case of their being owner in possession over

the disputed land as a Bhumidhar. They have not pleaded anywhere that their land was acquired by the Government for construction of 'pili dam' and thus, after displacement, they were allotted these lands so the whole argument on this aspect is without pleading and it cannot be taken into account. It was also argued that revenue entries cannot confer title on any person. Plaintiffs have to prove that they are the owners of the disputed land.

14. From the arguments of the parties, we are of the view that following points are to be determined;

1. "Whether the finding of the Court below under issue no.1 holding that the plaintiffs are the owners in possession of disputed plot nos. 24/2 to 24/28/1 and 28/2, 27/2 , 29 to 32 situate in village Ram Nagla is correct?"

2. "Whether the suit is hit by provisions of the Forest Act as the disputed land was admittedly declared as reserve forest land?

3. "Whether the suit is barred by Section 331 of the U.P.Z.A. & L.R. Act?

4. "Whether the plaintiffs were in possession of the disputed property on the date of the suit?

5. "Whether the suit is barred by the provisions of Sections 38 and 41 of the Specific Relief Act?

**POINT NO.1**

15. It is apt to notice the pleadings of the plaintiff as set out in the plaint. The plaint is a small document and it consists of only 12 paragraphs in all. In the opening part of the plaint it has been stated that the plaintiffs are Bhumidhars with transferable rights and are in possession of the plots described therein measuring 89 bighas 18 biswas Pukhta land. In the subsequent paragraphs i.e. in paragraphs 2 to 10 it has been stated that the office of the defendant no.2 is nearby and the respondent no.2 has personal enmity with the plaintiffs. The plaintiffs are carrying on the cultivation activities in the disputed plots and the defendants have no concern with them. It has been further stated that the plaintiffs sought permission for cutting the trees and in this regard the correspondence is going on but permission deemed to have been granted automatically. On 5th of July, 1991 the defendant with the police force removed the belongings of the plaintiffs and the matter has been reported to the concerned officer. They are still threatening the plaintiffs. Notice under section 80 CPC could not be given due to the urgency in the matter. This all what has been pleaded in the plaint.

16. In the plaint the plaintiffs have not disclosed their source of title as to how they have become Bhumidhar with transferable rights. The plots in question are their ancestral property or were acquired by them by means of sale deed, gift etc. has not been disclosed. There is no averment in the plaint that they are the recorded Bhumidhars in the revenue record of the plot in question. The pleading as set out in the plaint is short of necessary averment regarding their ownership. Non disclosure of the source of the title in the plaint is a fatal defect, specially when it was declared as reserve forest by the government notifications dated 31st of July, 1928 and 21st of January, 1939 issued under section 20 of the Indian Forest Act. The notifications are on record of the case and their existence was not disputed by

the plaintiffs. By the notification dated 31st of July, 1928, 1484 acres land situate at Rani Nagla was declared as reserve forest land. The boundaries are described therein. It is paper No.257 Ga. By subsequent notification dated 27th of January, 1939, 150 acres of land of District Bijnore, Pergana Afzalgarh of Rani Nagla was declared reserve forest land, under section 20 of the Indian Forest Act. The existence of the Forest Department is not disputed by the plaintiffs. Rather they have come forward with the case that the office of the Forest Department is there and people of Forest Department use to visit the said office and also reside.

17. It appears that the plaintiffs during trial took a new stand not set up in their plaint and evidence was led by them on the footing that they are displaced persons and their land has been taken away by the State Government in connection with construction of Dam known as Pili Jalashay. To rehabilitate such displaced persons, there were correspondence between different departments of the State Government and it was ultimately resolved that the displaced persons may be accommodated by providing them land of the Forest Department. The said plea has found favour with the trial Court. The question now arises whether the above plea could at all be considered by the trial Court in absence of necessary averments in this regard in the plaint and secondly, whether the plaintiffs have been able to prove any such case that they are displaced persons or their land was taken for the purposes of construction of Pili Jalashay and the land which is part of reserve forest was actually allotted to them.

18. Paper no. 32-C-1 is photocopy of minutes of the meeting held at Ram Nagar (Nainital) on April, 10,1966 and an endorsement of 'not admitted' has been made by appellant's counsel on this document. It is not a certified copy. Nobody on behalf of the plaintiffs has proved it. Nor it has come from proper custody. Though this document is not admissible in evidence but for the sake of argument, a perusal of this document reveals that 351.97 acre land was given to Irrigation Department for rehabilitation of the persons displaced due to submergence of their land in pili dam and for rehabilitation of affected cultivators. There is no document on record to show that plaintiffs were such tenure holders of the land which was acquired for pili dam. In fact there is no document which may point out that as to what was the number of plots, area and who were tenure holders of the land which was acquired for construction of pili Dam. If the pili dam was constructed on forest land then there was no occasion to rehabilitate the persons who were illegally occupying the forest land. If these persons were tenure holders of any revenue land then the plot numbers and name of tenure holders should have been mentioned in the notification if any for acquisition of land acquired for construction of pili dam. In the absence of any such document the theory that any land of plaintiffs was acquired for construction of pili dam is nothing but a cock and bull story.

19. On this count, we do not find any evidence on record which may show that any piece of land of the plaintiffs was acquired for construction of pili dam or their land was submerged in pili reservoir.

20. From the above discussion, we find that neither there is any pleading to that effect nor there is any evidence to support the argument advanced by respondent's

counsel. The lower court has erred in not considering this aspect.

21. Now, comes the second aspect of the case.

22. There is no iota of evidence on record to show that the reserve forest land was ever allotted to the plaintiffs. The date of allotment ,authority and order, if any, allotting the land to plaintiffs are not on record. The Court below has totally ignored this aspect of the matter and proceeded to hold the plaintiffs' title on the basis of some stray revenue entries in their favour in addition to the statement of witness Mohd. Ahamed PW/1.

23. At one place, witness Mahmood Ahmed, P.W. 1 who is husband of Akhtari has stated that plaintiffs' land is ancestral. If that would have been the case, plaintiffs would have filed Khatauni of basic year i.e. 1356 Fasli to show that their ancestors were recorded tenure holder of the disputed plot. The claim of ownership in this case does not travel beyond the Khatauni of 1396 Fasli. No record prior to 1396 Fasli has been filed. Plea of ancestral property and allotment of the disputed land in lieu of land taken for Pili Jalashay both cannot go hand to hand being inconsistent and contradictory to each other. On that count too we are of the opinion that plaintiffs have failed to prove their title over the disputed land.

24. Now, comes the revenue entries, allegedly recording the plaintiffs' names.

25. It has to be seen that when and under what circumstances plaintiffs' name came to be mutated in the revenue records and by whose order and whether plaintiffs have been able to prove that the entries are genuine.

26. In this case, plaintiffs have to prove that they are the owners in possession as Bhumidhar of the land and the revenue entries are genuine. The burden lies on them. Revenue entries are not documents of title. Here, they are not long standing entries. These entries at the most relate back around the period of filing of the plaint.

27. In the case of **State of Himachal Pradesh Vs. Keshav Ram** AIR 1997 SC 2181, the Apex Court has held that:

*"The question, therefore, arises as to whether the entry in the settlement papers recording somebody's name could create or extinguish title in favour of the person concerned? It is to be seen that the disputed land originally stood recorded in the name of Raja Sahib of Keonthal and thereafter the State was recorded to be the owner of the land in the record of right prepared in the year 1949-50. In the absence of the very order of the Assistant Settlement Officer directing necessary correction to be made in favour of the plaintiffs, it is not possible to visualize on what basis the aforesaid direction had been made. But at any rate such an entry in the Revenue papers by no stretch of imagination can form the basis for declaration of title in favour of the plaintiffs."*

28. In the case of **Balwant Singh and another Vs. Daulat Singh (dead) by Lrs. and others** AIR 1997 SC 2719, the Apex Court has held that, "entries and revenue record do not convey or extinguish any title."

29. In the case of **Vishwa Vijaya Bharati Vs. Fakhrul Hassan and others** AIR 1976 SC 1485, the Apex Court has held that:

*"It is true that the entries in the revenue record ought, generally, to be accepted at their face value and courts should not embark upon an appellate inquiry into their correctness. But the presumption of correctness can apply only to genuine, not forged or fraudulent, entries. The distinction may be fine but it is real. The distinction is that one cannot challenge the correctness of what the entry in the revenue record states but the entry is open to the attack that it was made fraudulently or surreptitiously. Fraud and forgery rob a document of all its legal effect and cannot found a claim to possessory title"*

30. In the case of **Narain Prasad Aggarwal (dead) by Lrs. Vs. State of Madhya Pradesh** (2007)11 SCC, 736, Apex Court has held that:

*"Record-of-right is not a document of title. Entries made therein in terms of Section 35 of the Evidence Act although are admissible as a relevant piece of evidence and although the same may also carry a presumption of correctness, but it is beyond any doubt or dispute that such a presumption is rebuttable."*

31. It has been mentioned in the plaint and also in the statement of P.W. 1 that plaintiffs have sought permission to fell certain trees on 20.3.1990 in which permission was not granted for a considerable time.

32. A perusal of the record reveals that Akhtari and Nirmala Devi moved an application, Paper no. 189-C for taking away trees on which Forest Department passed an order that they should obtain ownership certificate from District Magistrate, Bijnor. This clearly goes to show that Forest Department has raised objection regarding the ownership of the plaintiffs over the disputed land and trees. There is a specific order dated 28.2.1995 passed by the forest department against the plaintiffs, which has been confirmed by this Court in writ no.13772 of 1995, decided on 31.1.2002.

33. It will not be out of place to mention here that the case of defendants from the very beginning is that the land in dispute is the reserve forest land and the alleged revenue entries in favour of plaintiffs are forged and fictitious documents. As noticed herein above, these revenue entries are not long standing revenue entries and appears to be recorded for the first time in the year 1396 Fasli which corresponds to the year 1989. At this juncture, we may note that the District Magistrate had constituted a Committee consisting of high officials such as Sub Divisional Magistrate being the Chairman, Assistant Bhulekh Adhikari, Tehsildar Nagina, Tehsildar Dhampur, concerned ACF and Sri B.K. Garg, Assistant Engineer (Irrigation) as members. In the inquiry report which is on record it was found out that Maha Veer Singh @ Maha Dev Singh Malviya @ Maha Veer Singh @ Maha Kabir Singh @ Maha Dev Sharma etc. etc. , the then Lekhpal, Tehsil Nagina in connivance with Mahmood Ahmed @ Mohd. Ahmed @ Mahmood Khan etc. etc. by playing fraud and forging the documents with a view to give the undue advantage to their family members, friends and relatives have fabricated cases under sections 33/39 of U.P. Revenue Act to get the names of these persons recorded in the revenue record. A copy of the said report is on record.

34. It was rightly pointed out by the learned standing counsel that every attempt was made by the plaintiffs to conceal their identities. For example, the plaintiff no.4 Smt. Nirmala Devi is wife of Maha Veer Singh but instead she has been shown as daughter of Chhote Lal. The plaintiff no.1 is son of Maha Veer Singh. The importance of Maha Veer Singh in the matter is because of the fact that a detailed inquiry was conducted against Maha Veer Singh.

35. Indisputably, the plaintiff no.2 Abdullah is son of Mahmood Khan and Smt. Akhtari who is wife of Mahmood Khan has been described in the plaint as plaintiff no.3 as Smt. Akhtari D/o Imamuddin.

36. In the inquiry report it has come that these two persons have transferred the government property in the names of their son, wives, father, brother in law and other family members by fraudulent action and forging the revenue records and thus, caused a loss of Fifty Crores of rupees and have taken away 142.40 hectares land of National Forest known as Jim Corbett.

37. Plaintiffs have not averred a single word in their plaint that disputed land previously belonged to forest. P.W. (1) Mahmood Ahmad has also not uttered a single word in his examination-in-chief regarding the disputed land being the forest land. He has specifically denied that disputed land does not belong to Forest Department and it was never in possession over the disputed land.

38. It is to be noted that Khatauni Paper No.10 C (1) and 10 C (2) of the lower court record has been filed on behalf of the plaintiffs which is of 1396 to 1401 Fasli ie. Year 1991 to 1996.

39. P.W.1 Mahmood Ahmad, who is husband of Akhtari defendant/respondent no. 3 in this case has stated in cross examination that the disputed land is ancestral property of the plaintiffs and the proof is in the file. He has gone to the extent of denial.

40. The gazette by which land of village Rani Nangala was declared to be reserved forest is on record. He has admitted the suggestion that it is correct to say that 1484 acre land was acquired as reserved forest. The trial Court found that the disputed land was declared as reserve forest land through two official gazettes, referred above, the burden that subsequently a part of it ceases to be reserve forest would lay on the plaintiffs. The plaintiffs have failed to discharge the said burden.

41. A perusal of the plaint reveals that the fact that they have received the land in place of their land which submerged in pili dam has not been pleaded. In the case of **Union of India Vs. R. Bhushal,** (2006) 6 SCC 36, the Apex Court has held that "no evidence can be led on a plea not raised in the pleading."

42. In the case of **Ravinder Singh Vs. Nanmeja Singh and others** (2000) 8 SCC 191, Apex Court has held that "no evidence can be lead on a plea not raised in the pleadings and no amount of evidence can cure defect in the pleadings."

43. In the case of **M.M.B. Catholicos Vs. T. Paulo Avira** AIR 1959 Supreme Court 31, it has been held that plaintiff cannot be allowed to set up a new case in his evidence. He cannot be allowed to go out side his pleading and lead evidence on a fact not pleaded.

44. The Apex Court recently in **Maria Margarida Sequeria Fernandes and Others v. Erasmo Jack de Sequeria (Dead),** JT **2012 (3) SC 451** has again reiterated the importance of pleadings of the parties. The following observations are apt to reproduce :-

*"52. Truth is the foundation of justice. It must be the endeavour of all the judicial officers and judges to ascertain truth in every matter and no stone should be left unturned in achieving this object. Courts must give greater emphasis on the veracity of pleadings and documents in order to ascertain the truth.*

*53. Pleadings are the foundation of litigation. In pleadings, only the necessary and relevant material must be included and unnecessary and irrelevant material must be excluded. Pleadings are given utmost importance in similar systems of adjudication, such as, the United Kingdom and the United States of America."*

Thereafter, in para 61 it concluded that ***"pleadings are extremely important for ascertaining the title and possession of the property in question."***

45. D.W. 1 Abdul Sattar, has specifically stated that the disputed land was acquired as forest land through a gazette of the year 1928. 1484 acre land was declared reserve forest and after that in the year 1930,150 acre land was also notified to be the forest land. These notifications were issued under Section 20 of Indian Forest Act. He has further stated that these notifications are on record which are Paper No. 20-C and 33-C.

46. A perusal of the record reveals that paper no. 22-C and 33-C are the gazette notifications dated 15th September, 1928 and 27th January, 1939 respectively. The same papers have been filed vide no. 257-C and 258-C. Through these notifications 1484 acre land and 150 acre land was declared as reserved forest land. The court below also in the judgement while discussing issues no. 1,2,3, has held that the total area of Rani Nangala was declared reserved forest land through different gazette notifications.

47. We have examined the original record of the case and are constrained to observe that the trial Court has decreed the suit ignoring the fact that there is no evidence worth the name to support the plaintiffs' case. None of the plaintiffs appeared in the witness box. However, they have produced two witnesses namely Mahmood Ahmed PW/1 and Hakim Singh, PW/2. Indisputably, Mahmood Ahmed PW/1 is the husband of Akhtari, one of the plaintiffs. A bare perusal of the statements of witnesses would show that they could not state any material fact with regard to the plaintiffs' title, if any, to the disputed plots.

48. The witness PW/1 in the cross examination stated that he is retired from the post of Amin of Irrigation Department and that he was looking after the record of the land in question and the other related things. This statement in the cross examination goes a long way to support the contention of defendants as they have found on inquiry, that Mahmood Ahmed colluded with Maha Veer who was Lekhpal of the village and these two persons manipulated the revenue record because the records were in their possession and they had access to the record.

49. In para 11 of the cross examination PW/1 has stated that the land

was given to him in the year 1962-63 in exchange but could not state the particulars of his land which was taken in exchange. This is indicative of the fact that the witness is telling lie and his evidence lacks credit.

50. In further cross examination in para 16 the witness has stated that the disputed land was the ancestral property of the plaintiffs, a case which has not been even pleaded by the plaintiffs in the plaint. The land was declared reserve forest land in the year 1928 by the State Government by issuing gazette and there is no question of being ancestral property of the plaintiffs. The right, title or interest, if any, on declaration of reserve forest by the gazette notification vested in the government.

51. The other witness who has been examined is one Hakim Singh. He is a fellow villager and has stated that he got the land in exchange as also the plaintiffs got the land in exchange. He further stated that he knows the plaintiffs for the last 37 years. He also could not give the particulars of the plots which were given in exchange. In para 7 of the cross examination he has stated that he has not seen Nirmala Devi and Akhtari Devi carrying on any agricultural operation on the spot. The statement of the witness does not prove the possession of the plaintiffs over the land in dispute. Nor he could prove the title of the plaintiffs.

52. After having examined the oral evidence of the plaintiffs it is apt to consider the documentary evidence filed by the plaintiffs. On an examination of original record, we find that the plaintiffs have filed uncertified copies of certain documents along with various lists of documents. Through list of documents paper No.27 C, three documents 28 C, 29 C and 30 C were filed. Similarly, through the list of documents C-40, copy of report dated 4.7.1991 has been filed being paper No. 41C. Through list C-46, six documents C-47 to C-58 were filed. None of these documents is either original document or certified copies. The defendants have disputed the correctness and genuineness of these documents and have made endorsement " not admitted". Strangely enough, the plaintiffs have not produced any witness or evidence to prove these documents. The trial Court without caring as to whether the documents referred to above, have even been proved or not has proceeded to rely upon them. Consequently, these documents have not been proved in accordance with law, could not have been relied upon by the trial Court and as such the order of the trial Court is vitiated.

53. Whenever there is change in entry in revenue record, the procedure of Chapter III of U.P. Land Revenue Act has to be followed, especially Section 33 of U.P. Land Revenue Act 1901. Sections 34 to 39 of U.P. Land Revenue Act gives power of change in record and correction of entries.

54. Plaintiffs have not filed any order by which the revenue entries were ordered to be corrected or changed. The plaintiffs have not even filed any paper to show that such land was allotted to them by virtue of they being displaced person by construction of pili dam or reservoir. Paper no. 34-C-1/1 and 34-C/2 alleged to be written by the then Sub Divisional Magistrate, Nagina dated 27.3.1991 in which it has been mentioned that Executive Engineer, irrigation zone, Nainital has requested that the land of persons mentioned in the list attached with this letter, was acquired for construction of pili dam and some land was allotted to them and these are in possession of that land since last 28 years. But their names have not

been mentioned in revenue papers, so rent has not been fixed. Hence, the name of the persons mentioned in the list, be mutated in revenue records. This letter was filed by the plaintiffs but it was not admitted by the State Counsel and so it should have been proved by the plaintiffs. This letter has not been proved. It has not come from proper custody. This letter appears to be part of forgery because the plaintiffs have not pleaded in the plaint that their land was acquired for construction of pili dam or reservoir and the notification of acquisition is not on record. We feel that this has been deliberately concealed so as to cover the forged entries in revenue record.

55. It is also worthy to mention that none of the plaintiffs have examined themselves. Only husband of Smt. Akhtari who is party to the fraud, has appeared in the witness box. He too has admitted that the disputed land is surrounded by forest land on two sides. He has further stated that he has received this land in exchange and he cannot tell the plot numbers of the land which he has given in its exchange. He has further admitted Survey of India for 1966 to 1967 has prepared a map but in this map none of the plot numbers of plaintiffs have been shown. He has further admitted in his cross examination that office of the Forest Department is situated in the disputed land where forest officials live and work. It has further been stated in his cross examination that the building which comprises of the Office of Forest Department was constructed by Forest Department. It was constructed according to him forcefully but he has not taken any action for removal of that building.

56. In the case of **Adivekka and others Vs.Hanamavva Kom Venkatesh and others** AIR 2007 SCC 2025, it has been held that non examination of the party to the lis would lead to drawal of an adverse inference in the case. The Apex Court has based this observation on earlier laws laid down in the case of Sardar Gurbakhsh Singh vs. Gurdial Singh and Another **AIR 1927 Privy Council 230 and Tulsi and others Vs. Chandrika Prasad and others (2006) 8 SCC 322.**

57. From the above discussion, we are of the opinion that plaintiffs have not been able to prove that the *Khataunis* filed by them are genuine documents. The entire land of Rani Nangala was declared a reserved forest land by Government Notification. No order by which plaintiffs' names were mutated in Khatauni, have been filed or proved and the procedure given in Sections 34 to 39 of U.P. Land Revenue Act has not been followed.

58. In view of the above discussion, we are of the opinion that the plaintiffs have failed to establish their title over the land in question.

59. We could lay our hands to a recent decision in the case of **R. Hanumaiah and another V. Secretary to Government of Karnatka Revenue Department and others,** 2010 (4) JT 411, wherein the Apex Court has held as follows:

**Government Property--Suit for declaration of title/injunction against--Duty of civil court--**

"Many civil courts deal with suits for declaration of title and injunction against Government, in a casual manner, ignoring or overlooking the special features relating to Government properties. Instances of such suits against Government being routinely decreed, either ex parte or for want of

proper contest, merely acting upon the oral assertions of plaintiffs or stray revenue entries are common. Whether the Government contests the suit or not, before a suit for declaration of title against a Government is decreed, the plaintiff should establish, either his title by producing the title deeds which satisfactorily trace title for a minimum period of thirty years prior to the date of the suit (except where title is claimed with reference to a grant or transfer by the Government or a statutory development authority), or by establishing adverse possession for a period of more than thirty years. In such suits, courts cannot, ignoring the presumptions available in favour of the Government, grant declaratory or injunctive decrees against the Government by relying upon one of the principles underlying pleadings that plaint averments which are not denied or traversed are deemed to have been accepted or admitted.

A court should necessarily seek an answer to the following question, before it grants a decree declaring title against the Government : whether the plaintiff has produced title deeds tracing the title for a period of more than thirty years; or whether the plaintiff has established his adverse possession to the knowledge of the Government for a period of more than thirty years, so as to convert his possession into title. Incidental to that question, the court should also find out whether the plaintiff is recorded to be the owner or holder or occupant of the property in the Revenue Records or Municipal Records, for more than thirty years, and what is the nature of possession claimed by the plaintiff, if he is in possession - authorized or unauthorized; permissive; casual and occasional; furtive and clandestine; open, continuous and hostile; deemed or implied (following a title)."

60. This Court has noticed in the recent past that there is a growing tendency of officials working in the revenue department in districts around Delhi in NCR region to manipulate the revenue record for their own gains. It is apposite to reproduce one such remark made by Hon'ble Mr. Justice S.U. Khan, while dealing in such matters, in **Dina Nath Vs. State of U.P. and others, 2009 (108) RD 321.** Paragraphs 11 and 12 are reproduced below:-

*"11. The experience of the Court is that during consolidation proceedings, Consolidation Authorities/ Officers liberally donate the Gaon Sabha properties to influential/ resourceful persons by passing such orders as has been passed in the instant case.*

*12. Accordingly, all the Collectors of all the Districts in the State are directed to reopen such cases where names of private persons are entered in revenue records on the basis of old pattas or adverse possession over Gaon Sabha land and correct the illegality by taking suo motu action. However, no orders shall be set aside without issuing notice and hearing affected persons. If notice through registered post is not served then it may be served through publication in the newspaper also. If it is found that some Consolidation Officer or S.O.C. or D.D.C. has done similar thing, then the action must be proposed to be taken against him also."*

61. The aforesaid observation has not been interfered with by the Supreme Court in Petition (s) for Special Leave to Appeal (Civil) CC 4398/2010. The Supreme Court

has made following observation in the Special Leave Petition:-

".....In a matter like the present one, the Court cannot be a silent spectator and is bound to perform its constitutional duty for ensuring that the public property is not frittered by unscrupulous elements in the power corridors and acts of grabbing public land are properly enquired into and appropriate remedial action taken."

62. It has come in evidence and papers have been filed to show that the entire land of Rani Nangala was acquired for reserved forest so the ownership vested in the State and afterwards in Forest Department. In view of this fact, plaintiffs have to prove that the disputed land was allotted to them in lieu of their land being sub-merged in pili dam. The necessary corollary would be that they will have to prove that they were owners of the land which was required for construction of pili dam or their land was sub-merged with water after construction of the pili dam. As discussed above, neither it has been pleaded nor it has been stated in the oral evidence that any land of the plaintiffs was taken for construction of Pili Jalashaya. But since plaintiffs have argued about this fact and lower court has believed it and also these facts have been averred during argument before us, so in order to avoid any confusion, we discussed and made analysis of this aspect also.

**POINT No.2.**

63. Section 27 of the Indian Forest Act, 1927 gives the power to the State Government to declare forest no longer reserve. It provides that the State Government by notification in the official gazette, directs that, from a date fixed by such notification, any forest or any portion thereof reserve under the Act shall be ceased to be a reserve forest. Section 27A has been inserted by the State of U.P. vide U.P. Act No.23 of 1965 w.e.f. 23rd of November, 1965 which reads as follows:-

"27A. Finality of Orders, etc.;

64. No act done, order made or certificate issued in exercise of any power conferred by or under this Chapter, except as herein before provided, be called in question in any court."

65. The U.P. Amendment Act completely bars the jurisdiction of any court to decide the legality and validity of any act done, order made or certificate issued under Chapter II of the Indian Forest Act.

66. It follows when a reserve forest has been established through notification, it shall cease to be a reserve forest only when there is a notification to this effect by the State Government in the official gazette and not by any other process. In the case on hand, we do not find any such notification on record. This being so, it is end of the matter, so far as the plaintiffs are concerned. The land in dispute continues to be reserve forest land and the suit is hit by section 27A, as added in State of U.P..

**POINT NO.3.**

67. The present suit is for permanent injunction. In the plaint there is no averment that the plaintiffs were ever recorded in the revenue record. The permanent injunction has been sought for on the ground of possession as Bhumidhar with transferable right. In absence of any pleading that the plaintiffs' names were recorded in any revenue year, they should have approached the revenue Court for

declaration of their title as also for injunction under section 229 D of U.P.Z.A. & L.R. Act, power to grant injunction also vests in the revenue Court.

68. The Court below has proceeded to hold that the suit is not barred by section 331 of the U.P. ZA & L.R. Act on the ground that the names of plaintiffs are recorded in the revenue record and they have filed the revenue receipts showing the payment of revenue. The said approach of the Court below is faulty in as much as the specific case of the defendants is that the revenue entries are forged and fictitious entries. Indisputably, the plots in question were originally recorded in the name of the Forest Department in the revenue record over these plots. Subsequently, it appears that the entry for the Forest Department was scored out and the plaintiffs' names were entered without there being any judicial order in this regard. A procedure for scoring out name of recorded land holder is provided in the U.P. Revenue Act but there is nothing to show that the said procedure was followed. It necessarily requires the passing of an order to this effect by a Revenue Officer.

69. In the plaint it is not averred that the plaintiffs are the recorded tenure holders, but in evidence, the plaintiffs have tried to establish their title over the disputed land. In our view, such a question can be decided by revenue court alone in a suit instituted under section 229 B of the U.P.Z.A. & L.R. Act as laid down by the Apex Court in **Kamla Prasad Vs. Krishna Kant Pathak, 2007 (102) RD 378**. Therefore, we hold that the civil suit is barred under section 331 of UPZA & LR Act.

**POINT NO.4**

70. A reading of the plaint would show that the plaintiffs averred therein that on 5th of July, 1991, the defendants dispossessed them and prevented the plaintiffs to carry out agricultural operation on the disputed land, vide para 10. In para 6 it has been stated that on the aforestated date the defendant no.2 along with police force demolished the temporary constructions of the plaintiffs and uprooted them.

71. On behalf of the plaintiffs the main witness PW/1 also admits that the plaintiffs were dispossessed by police force.

72. The other aspect of the deposition of PW/1 is that the office of the Forest Department is on the land in dispute. In para 21 it has been stated that " Vivadit Araji Mein Banvibhag Ka Daftar Bana Hai. Banvibhag Ke Adami Rahaten Hain, Aten Hai, Chale Jate Hain. Hamari Jameen Par Jabaran Kabja Kar Rakkha Hai. Ye Building Jisme Daftar Ha Banvibhag Ki Banvayee Huyi Hai. Jabardasti Banvayi Hai. Hamane Is Building Ko Hataney Ka Dawa Nahi Kiya."

73. From the above, it follows that the witness has admitted that he is not in possession over the property in dispute. The property in dispute is in possession of the Forest Department and the latter has an office on the disputed land. Employees of the Forest Department are residing over the disputed land.

**POINT NO.5**

74. Ajai Singh and Maqsood Ahmed had earlier filed a writ petition no. Nil of 1991 before this Court for permission to cut

and remove the trees. The said writ petition was disposed of by order dated 7th October, 1991.

*"The case of the petitioners is that they have applied for permission to cut and remove the trees to Divisional Forest Officer,Tarai Paschimi I Prabhag Ram Nagar, Nainital but the said application has not yet been disposed of under the provisions of U.P. Protection of Trees in Village and Mill area 1966. There is no material on record to show that the said application was received by the office of the Divisional Forest Officer, Tarai Paschimi I Prabhag, respondent no.2. However, in case the petitioners application is received, we direct the Divisional Forest Officer, respondent no.2 to dispose of the same within one month. With these directions the writ petition is disposed of."*

75. In pursuance of the aforesaid order the matter was considered by the Forest Department and their application for permission to cut the trees was rejected on the ground that the trees belong to the Forest Department by the order dated 4th November, 1991 (Paper No.260 C2). In the application for permission filed by Ajai Singh and Maqsood Ahmed, they did not claim any title for land in question. It appears that the order dated 4th November, 1991 dismissing their representation was challenged before this Court in writ petition No.3725 of 1992. The writ petition was allowed and the matter was restored to the concerned authority for making necessary inquiry after affording reasonable opportunity of being heard to the petitioners therein. In pursuance thereto, the matter was considered by the Director, Jim Corbett Reserve U.P. Ram Nagar, District Naini Tal who passed a detailed order dated 28.2.1995 rejecting their representation. It was again challenged in writ petition no.13772 of 1995 before this Court. The said writ petition was dismissed by the order dated 31st of January, 2000. The said order is reproduced below:-

*"Even though Smt. Sarita Singh, learned Standing Counsel is present on behalf of the state of Uttar Pradesh, no one turns up on behalf of the petitioner to press this writ petition.*

*This writ petition is, consequently, dismissed."*

76. Meaning thereby, the Forest Department had disputed the title, interest and right, if any, of the plaintiffs either in or on the land or in the standing trees. The plaintiffs ought to have sought declaration of their title before competent Court. In absence of any such relief simplicitor suit for injunction is barred by the provisions of Specific Relief Act by section 41(h) in particular. In view of finding on point no.4, the suit, in the absence of relief for possession, is not maintainable.

77. The order passed by the Forest Department refusing the grant of permission to the plaintiffs having been challenged unsuccessfully before writ court as the writ petition was dismissed, had attained finality and the Civil Court committed illegality in not taking a note of it.

78. The report of the committee which is a bulky document was prepared by five high government officials was produced before the trial Court but the same has been very conveniently ignored on the flimsy ground that no departmental action appears to have been taken against the erring official. Be that as it may, when the case of the defendant was that the revenue entries

are forged and fictitious entries, before placing any reliance upon these revenue entries, the Court was under legal obligation to examine the legality and validity of those revenue entries first. It is an acknowledged legal position that from forged and fictitious revenue entries right, title or interest will not flow to such persons. The dispute is with regard to revenue paying land, wherein declaration of title is necessarily involved which could be declared by revenue Court. However, in view of the finding recorded by us on the merits of the case, this issue has become more or less academic.

In short, our conclusions are as follows:-

1. The plaint lacks material pleading with regard to the plaintiffs' title over the property in dispute and as such they have failed to prove their ownership over the property in question.

2. The land in dispute was admittedly declared as reserve forest land by issuing notifications under the Indian Forest Act, there being no notification with regard to the de-reservation of plot in question, the suit before the Court in view of sections 27 and 27A (as amended in the State of U.P.) can not be decreed.

3. The plaintiffs have not come with clean hands before the Court. They are family members, being son and wife of Maha Veer, the then Lekhpal of Tehsil Nagina and wife of Mahmood Ahmed, the then Amin (Irrigation), Afzalgarh Khand Kashipur who colluded with one another and manufactured the revenue record for wrongful gain to their family members and to swallow the government property measuring 142.400 hectares of land valued at fifty crores of rupees reserved as buffer zone land for national forest known as Jim Corbett.

4. None of the plaintiffs appeared in the witness box and as such an adverse inference against them should have been drawn. They have failed to prove either title or possession over the disputed land.

5. The plaintiffs have failed to prove the documentary evidence filed by them which are in the nature of photostat copies either by producing the original documents or by producing a witness to prove their genuineness and correctness. They are forged and fictitious documents and have not come from proper custody.

79. In view of the above discussion, it is held that the judgement of trial court is not based on pleading and admissible evidence. We are, therefore, of the opinion that the judgement under appeal cannot be sustained. The appeal is liable to be allowed.

80. Before parting with the case, we have tried to find out the truth of the matter and extensively examined the original record of the Court below. The Apex Court in the case of **Maria Margarida Sequeria Fernandes and Others v. Erasmo Jack de Sequeria (Dead)** (supra) has observed that Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth. The Apex Court in para 52 of the report has laid down as follows:-

*"52.Truth is the foundation of justice. It must be the endeavour of all the judicial officers and judges to ascertain truth in every matter and no stone should be left unturned in achieving this object. Courts must give greater emphasis on the veracity of pleadings and documents in order to ascertain the truth."*

81. Having regard to what has been said above, we are of the opinion that the plaintiffs have not approached the Civil Court for vindication of their rights but more to get the seal of approval on their fraudulent acts. It is known that the Jim Corbett Park is one of the oldest national park of the country to preserve the faun and fauna. The park is known for its initiative Project Tiger, for endangered Bengal tiger of India. The total area of the reserve is 1318.54 sq. km. consisting 520 sq. km. of core area and 797.72 sq. km. of buffer area. After India's Independence in 1947, the park was renamed as Ramganga National Park. But in 1956 it was renamed as Jim Carbett National Park in the memory of Colonel Jim Corbet. The land in dispute as come in the inquiry report was buffer land of the aforesaid park. The persons who were responsible to protect the land, it is unfortunate, are its grabbers. The fraud committed by the plaintiffs came to surface only when an inquiry was initiated that there is no official record to show Rani Nagla as revenue village.

82. The appeal is allowed with cost throughout. Impugned judgement dated 30.5.2005 and decree dated 8.7.2005 are set aside and the original suit no. 545/1991 (Ajay Singh and others Vs. State of U.P. And others) is dismissed.

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**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 11.10.2012**

**BEFORE**
**THE HON'BLE DEVI PRASAD SINGH, J.**
**THE HON'BLE VISHNU CHANDRA GUPTA, J.**

F.A.F.O. No. 760 of 2006

**Oriental Insurance Company, Branch Office, Bahraich, Through the Deputy General Manager, Regional Office, 3rd Floor, L.I.C. Investment Building, Hazratganj, Lucknow. ...Appellant**

**Versus**

**Smt. Savitri Devi and others ...Respondents**

**Counsel for the Petitioner:**
Sri Ashotosh K. Singh, Advocate ,

**Counsel for the Respondents:**
Sri Himanshu Kumar Srivastava, Advocate,

**Motor Vehicle Act, 1988-Section 173-Appeal against award of Accident Claim Tribunal-accident and involvement of vehicle established-negligence on part of Zeep driver also established by Tribunal-third Party Risk-liability to pay entire amount of compensation fastened upon the Insurance Company-with liberty to recover the same from the Driver and owner of the vehicle.**

**Held: Para-12**

**In view of the above proposition of law in the light of the fact of this case, the appeal is allowed. The award is modified to the extent that the amount of compensation determined by the Tribunal shall be paid by the Appellant Insurance Company and recover the same from the owner or driver of the vehicle in question, the respondent no. 3 and 4, who are jointly and severally liable to pay the compensation to claimant respondent no. 1 and 2 by**

**moving an application before the Tribunal concern.**

**Case Law discussed:**

2000 (1) TAC page no. 98 Supreme Court; 2004 (1) TAC 105 Allahabad; F.A.F.O. 1389 of 2009 ( New India Assurance Company Ltd. Vs. Sanjeev Kumar and Others, decided on 21.09.2012; 2008 (1) SCC 696; 2009 SCC (2) 151; (2008) 3 SCC page 464;F.A.F.O. No. 893 of 2009 National Insurance Co. Ltd Vs. Smt. Gita Mishra decided on 06.08.2012

(Delivered by Hon'ble Vishnu Chandra Gupta, J

**J U D G M E NT**

1. This appeal under Section 173 of Motor Vehicle Act 1988 (In short the 'Act') has been preferred by Oriental Insurance Co. Ltd dissatisfying with an award dated 29.8.2006 passed by Motor Accident Claim Tribunal / Fast Track Court No. 1, Bahraich (In short 'Tribunal') in Motor Accident Claim Petition No. 39/70 of 2001.

2. The relevant facts for deciding this appeal in short are that one Pradeep Kumar was coming back to his house along with his Nana Sant Ram after easing himself and when crossing the Gonda-Bahraich road in village Udharna Thakurain, District Srawasti on 25.8.1999 at about 10.30 AM a Mahindra Pick- up Jeep having registration no. UP-45/1782 driven by its driver Rajendra Singh (Respondent no.3) in a rash and negligent manner hit Pradeep Kumar , who received sever injuries and succumbed to injuries on the spot. The first information report of this incident was lodged by father of the deceased Dwarika Prasad (Respondent No. 2). On the same day at Crime No. 189 of 1999 under Section 279, 304 I.P.C. wherein the number of the vehicle was mentioned as UP 43-1782. Later on during investigation the jeep number was corrected and the vehicle number, by which accident said to have been occurred, was mentioned as UP 45-1782.

3. The parents of the deceased Pradeep Kumar, had filed a motor accident claim before the tribunal for award of compensation of Rs. 3,00,000/- on account of death of the deceased Pradeep Kumar who was aged about 6 years and student of Class-II. The petition was contested by driver Rajendra Singh, owner Raghwendra Prasad Mishra and Insurer Appellant by filing their respective written statements. Rajendra Singh in his written statement pleaded that he was not negligent in driving the vehicle. It was deceased who negligently crossing the road and the incident was occurred due to negligence of the deceased. He was having a valid and effective driving license having No. R-3068-G-N-D-99 issued from the office of R.T.O., Gonda. The same was valid from 22.07.1995 to 21.07.2015. The license was valid for driving private light motor vehicle. Raghwendra Prasad Mishra pleaded that the driver was not Rajendra Singh on the vehicle in question but driver was Umesh Chandra, who died in the year 2002, He was having valid driving license to drive the aforesaid vehicle. It was further pleaded that vehicle was dully insured with Appellant Insurance company under cover note no. 722503 with effect from 20.05.1999 to 19.05.2000. Although, the accident has been denied by owner but in the alternative it has been pleaded that even if it is found that owner is liable for any compensation in that event the Insurance Company would be bound to indemnify him to the extent of amount of compensation. It was further pleaded that the vehicle was being driven under all valid documents. The Insurance Company disowned his liability by pleading breach of terms of policy for want of valid driving licence with driver and other papers.

4. On the basis of pleadings of the parties the tribunal framed certain issues. Issue No. 1 is relating to negligence of the driver of jeep in the accident and death of Pradeep Kumar. Issue no. 2 was framed regarding the validity of the papers of vehicle in question. Issue no. 3 is related to validity of driving license of driver of jeep. Issue No. 4 was framed in respect of insurance of the vehicle and issue no. 5 was framed in respect of quantum, entitlement and its liability to pay the compensation to the petitioner.

5. The tribunal decided issue no. 1 in affirmative holding therein that the accident was caused due to sole negligence of jeep driver resulting into death of Pradeep Kumar in the aforesaid accident, which was occurred due to involvement of vehicle No. UP-45-1782. While deciding issue no. 4 in affirmative it was held that vehicle in question was dully insured on the date of accident with Appellant Insurance Company. While deciding issue nos. 2 and 3 it was held that the driver of the jeep at the time of accident was Rajendra Singh, who was having a valid driving license for driving private light motor vehicle. It was further held that the vehicle in question on the basis of registration certificate was a goods carrier, but in view of the judgment of Hon'ble Supreme Court reported in **2000(1) TAC page no. 98 Supreme Court (Ashok Gangadhar Vs. Oriental Insurance Company Ltd.)** and the judgment reported in **2004(1) TAC 105 Allahabad (New India Insurance Company Ltd. Vs. Smt Sunita and others)** held that insurance company in case of 3rd party risk cannot escape with its liability even if it is found that vehicle in question was being driven by a driver having not a valid driving license.

6. While deciding Issue No. 5 the tribunal award a compensation of Rs. 1,75,000/- with 6% simple pendente lite and future interest, but liability was fastened totally on Appellant Insurance Company and right to recovery has also not been given to Appellant Insurance Company. Aggrieved with this part of the award which relates to liability of the Insurance Company, this appeal has been filed.

7. The moot question in this appeal for consideration is :-

"***Whether in the given set of circumstances Insurance Company would be liable to pay compensation? if so, whether the Insurance Company would be entitled to recover the amount of compensation from the owner and the driver of the vehicle in question"***

8. Aforesaid controversy is not res-integra. In recent decision rendered by this Division Bench in **F.A.F.O. 1389 of 2009 ( New India Assurance Company Ltd. Vs. Sanjeev Kumar and Others, decided on 21.09.2012** this controversy set at rest. In aforesaid Division Bench case the judgment relied upon by tribunal in **Ashok Gangadhar Maratha (Supra)** was also considered and after relying upon the judgment rendered by Hon'ble Supreme Court in **New India Assurance Co. Ltd V/s Prabhu lal 2008(1)SCC 696** and Judgment report in **Oriental Insurance Co. Ltd Vs. Angal Kol, 2009 SCC(2) 151** and also distinguishing the judgment rendered by **Hon'ble Supreme Court in National Insurance Co. Ltd Vs. Annapa Irappa Nesaria @ Nesaragi and Others, (2008) 3 SCC page 464** held that driver having licence to drive light motor vehicle cannot be permitted to drive transport vehicle. The relevant paragraphs of the aforesaid

Division Bench judgment in Sanjeev Kumar's case (Supra) are reproduced herein-below:-

"39. The counsel for the petitioner relying upon the judgment of Hon'ble Apex Court in **Annappa Irappa's** case (supra) would submit that in view of judgment rendered in the aforesaid case a driving licence to drive light motor vehicle would be valid to drive the Vikram Tempo whose laden weight is less than 7500 Kg.

40. The learned counsel for the appellant cited judgment of **Angad Kol's** case (supra) wherein the judgment in **Annappa Irappa's** case (supra) has been considered and distinguished on the ground that **Annappa Irappa's** case (supra) is based on the provisions contained in Motor Vehicle Act prior to amendment of 2001, so in view of the amended provisions the **Annappa Irappa's** case (supra) after amendment made in 2001 cannot be followed. It would be necessary to reproduce relevant paragraph of **Angad Kol's** case (supra)

*"**16**. Had the driving licence been granted for transport vehicle, the tenure thereof could not have exceeded to three years."*

In National Insurance Co. Ltd. v. Annappa Irappa Nesaria [(2008) 3 SCC 464] this Court noticed the aforementioned development in the matter of grant of licence to a transport vehicle stating that the same became effective from 28-3-2001 in the following terms:

*"20. From what has been noticed hereinbefore, it is evident that "transport vehicle' has now been substituted for "medium goods vehicle' and "heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time to cover both "light passenger carriage vehicle' and "light goods carriage vehicle'. A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well.*

*21. The amendments carried out in the Rules having a prospective operation, the licence held by the driver of the vehicle in question cannot be said to be invalid in law."*

41. The effect of the different terms of licences granted in terms of the provisions of Sections 2(14) and 2(47) has also been noticed by Apex Court in **New India Assurance Co. Ltd. v. Prabhu Lal [(2008) 1 SCC 696 : (2008) 1 SCC (Cri) 308],** relevant part is being reproduced herein below (SCC pp. 704-06, paras 30 and 37-38),

*"30. Now, it is the case of the Insurance Company that the vehicle of the complainant which met with an accident was a "transport vehicle'. It was submitted that the insured vehicle was a "goods carriage' and was thus a "transport vehicle'. The vehicle was driven by Ram Narain, who was authorised to drive light motor vehicle and not a transport vehicle. Since the driver had no licence to drive transport vehicle in the absence of necessary endorsement in his licence to that effect, he could not have driven Tata 709 and when that vehicle met with an accident, the Insurance Company could not be made liable to pay compensation.*

***

*37. The argument of the Insurance Company is that at the time of accident,*

*Ram Narain had no valid and effective licence to drive Tata 709. Indisputably, Ram Narain was having a licence to drive light motor vehicle. The learned counsel for the Insurance Company, referring to various provisions of the Act submitted that if a person is having licence to drive light motor vehicle, he cannot drive a transport vehicle unless his driving licence specifically entitles him so to do (Section 3). Clauses (14), (21), (28) and (47) of Section 2 make it clear that if a vehicle is "light motor vehicle', but falls under the category of transport vehicle, the driving licence has to be duly endorsed under Section 3 of the Act. If it is not done, a person holding driving licence to ply light motor vehicle cannot ply transport vehicle. It is not in dispute that in the instant case, Ram Narain was having licence to drive light motor vehicle. The licence was not endorsed as required and hence, he could not have driven Tata 709 in the absence of requisite endorsement and the Insurance Company could not be held liable.*

*38. We find considerable force in the submission of the learned counsel for the Insurance Company. We also find that the District Forum considered the question in its proper perspective and held that the vehicle driven by Ram Narain was covered by the category of transport vehicle under clause (47) of Section 2 of the Act. Section 3, therefore, required the driver to have an endorsement which would entitle him to ply such vehicle. It is not even the case of the complainant that there was such endorsement and Ram Narain was allowed to ply transport vehicle. On the contrary, the case of the complainant was that it was Mohd. Julfikar who was driving the vehicle. To us, therefore, the District Forum was right in holding that Ram Narain could not have driven the vehicle in question."*

42. The Hon'ble Supreme Court distinguished its earlier judgment in **Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd**. [(1999) 6 SCC 620 : 1999 SCC (Cri) 1170], stating: (Prabhu Lal case [(2008) 1 SCC 696 : (2008) 1 SCC (Cri) 308] , SCC p. 707, para 41

*"41. In our judgment, Ashok Gangadhar [(1999) 6 SCC 620 : 1999 SCC (Cri) 1170] did not lay down that the driver holding licence to drive a light motor vehicle need not have an endorsement to drive transport vehicle and yet he can drive such vehicle. It was on the peculiar facts of the case, as the Insurance Company neither pleaded nor proved that the vehicle was transport vehicle by placing on record the permit issued by the Transport Authority that the Insurance Company was held liable.*

*However, in this case, the finding of fact arrived at that the vehicle in question was not proved to be a goods vehicle is not correct. The Regional Transport Officer, in his deposition, stated that the vehicle in question was a goods vehicle.*

*From the discussions made hereinbefore, it is, thus, proved that Respondent No1 did not hold a valid and effective driving licence for driving a goods vehicle. Breach of conditions of the insurance is, therefore, apparent on the face of the record."*

43. In the aforesaid facts and circumstances, we are of the firm view that in the case in hand Vikram Tempo is a transport vehicle and the deceased Ajay Kumar @ Sintu who was the driver of the Vikram Tempo having registration No. UP 42-T 5674, was having a driving licence to drive light motor vehicle and not the

transport vehicle. Therefore the deceased was not having any valid and effective driving licence to drive the Vikram Tempo at the time of accident.

44. The effect of this finding would be that the Appellant Insurance Company after making the payment of awarded compensation to the petitioner shall be entitled to recover the amount from Owner of the Vehicle as held by this Court in **F.A.F.O. No. 893 of 2009 National Insurance Co. Ltd., Through its R.M. Vs. Smt. Gita Mishra and others decided on 6.8.2012"**

9. It is not in dispute that deceased of this case is squarely falls within the definition of 3rd party. The driver of the offending vehicle was having a only driving licence to drive light motor vehicle. The vehicle in question is admittedly transport vehicle. Hence, terms of policy has been violated and it is established that owner committed breach of terms of policy.

10. This Division Bench in aforesaid circumstances in **F.A.F.O. No. 893 of 2009 National Insurance Co. Ltd Vs. Smt. Gita Mishra decided on 06.08.2012** held that in such circumstances the insurance company would not be saddled with liablity to pay compensation but in case of 3rd party risk the insurance company will pay amount of compensation determined by the Tribunal/Court to the claimants and then recover the same from owner of the vehicle. The relevant para of the aforesaid judgment is reproduced herein-below:-

"59. On the basis of the provisions contained in Chapter XI and XII of M.V.Act 1988 and the proposition of law laid down by the Apex Court it is held that where the owner of the vehicle has taken the compulsory statutory policy of Insurance of vehicle , called as 'Act Policy' following consequences shall follow in motor accident claims for payment of compensation to the victims/claimants of motor vehicle accident;

***- In cases of 'third party risk' the insurance company would be liable to indemnify the losses of the owner of vehicle and would be liable to pay the determined compensation to the victims/claimants.***

***- In case of 'third party risk' if Insurance Company succeed in establishing the breach of terms of insurance policy in the light of section 149(2) of M.V.Act1988, though insurance company would not be liable to indemnify the losses of owner of the vehicle but concerned insurance company would pay the determined compensation to the claimants with a right to recover from the owner of the vehicle involved in the accident to the extent, the amount paid with interest to the claimants.***

***-The gratuitous passengers (except owner of goods or his authorised representative carried in the vehicle along with goods) in goods vehicle/carriage could not be permitted to travel. They being victim or in case of death their heirs could claim compensation from the owner of the vehicle in which they are trevelling and not from the insurance company of the concern vehicle. The insurance company would not be liable to indemnify the amount of compensation paid by the owner. In such situation the insurance company could not be saddled with any liability including the liabilities to pay compensation to victim/claimants with right to recover from owner of the vehicle.***

***- The direction given by Apex Court in some of its authorities to insurance companies to pay the amount of compensation to the victims/claimants in cases other than those covered under 'third party risk', with intent to do complete justice between the parties in any cause or matter pending before the Supreme Court in its extraordinary jurisdiction vested under Article 142 of the Constitution of India would be binding in between the parties of that cause or matter but can not be taken as binding precedent in other matters."***

11. No other point was pressed,argued or raised by the Counsel for Appellant.

12. In view of the above proposition of law in the light of the fact of this case, the appeal is **allowed**. The award is modified to the extent that the amount of compensation determined by the Tribunal shall be paid by the Appellant Insurance Company and recover the same from the owner or driver of the vehicle in question, the respondent no. 3 and 4, who are jointly and severally liable to pay the compensation to claimant respondent no. 1 and 2 by moving an application before the Tribunal concern.

13. The amount deposited by the Appellant Insurance Company in this court including the statutory deposit be remitted to the Tribunal concerned forthwith but not later than a month. The Tribunal thereafter will disburse the amount of compensation to the claimant respondents no. 1 and 2 in terms of the award within two months thereafter.

14. There shall be no order as to costs.

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**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 12.10.2012**

**BEFORE**
**THE HON'BLE SHEO KUMAR SINGH, J.**
**THE HON'BLE ARVIND KUMAR TRIPATHI (II), J.**

First Appeal No. 967 of 1999

**Union of India & others ...Appellant**
**Versus**
**Anil Kumar and others ...Respondents**

**Counsel for the Petitioner:**
Sri Subodh Kumar
S.C.

**Counsel for the Respondents:**
Sri A.K. Gupta

**Land Acquisition Act-Appeal against reference order-possession of land taken in the year 1971-on failure of negotiation between parties-as per direction of Court Notification under Section 4 issued in the year 1971-considering exempler by reference compensation enhanced from 1000/-per square yard to 1200 per square yard-for the period of possession without notification too till the date of publication of notification-claimant entitled about rent for use and occupation with 9% interest and thereafter to pay interest @ 15%-accordingly order of reference Court modified-appeal partly allowed.**

**Held: Para-27**

**In this case, the Apex Court has specifically held that in a case where a land owner is dispossessed prior to issue of earlier notification under section 4 (1) of the Act, the Government merely take possession of he land. It is fully open to the land owner to recover compensation of the land by taking appropriate legal proceedings, therefore, he is only entitled to get rent or damages for use**

**and occupation for the area government has taken possession of the property. Where possession is taken prior to the issues of the preliminary notification it will be just and adequate that the Collector may also determine rent or damages for use of the property to each of the land owner is entitled while determining the compensation amount payable to the land owner for the acquisition for the property. As the matter is too old hence it will not be proper to remand the matter for such determination. Hence we are of the view that Collector be directed and is so directed to determine such amount as compensation for use and occupation of the land from the date of taking possession till the date of notification i.e. 01.07.1971 till 16.02.1997, within a period of one year from producing a certified copy of this order. If the Collector fails to do so within that period, then it will be open to the claimants to resort to appropriate legal action/remedy.**

**Case Law discussed:**

AIR 2010 SC 2322; 2011 3 AWC 2650 SC; (1995) 2 SCC 142; (2004) 4 SCC 79; (2004) 9 SCC 337; (2004) 9 SCC 344; (2005) 1 SCC 545; (2005) 12 SCC 443.

(Delivered by Hon'ble Arvind Kumar Tripathi-(II), J)

1. Heard learned counsel for the parties and perused the record.

2. These four first appeals have arisen out of the judgement and decree dated 09.07.1999 passed by Additional District Judge, Kanpur Nagar in Land Acquisition Reference Case No. 64/70 of 1997 Anil Kumar and others vs. Union of India and others and Land Acquisition Reference Case No. 92/70 of 1997, Deoraj and others vs. State of Uttar Pradesh and others.

3. These two references were decided by a single judgement and both state and claimants have preferred their respective appeals, hence all the cases are being taken together.

4. Briefly stated, the claimants of the two cases, are owners of land *Khasra* plot No. 42 and 43 (area 0-17-10) which is equal to 2144Sq. Yards situate in village Shafipur, Kanpur Nagar, known as Lal Banglow. The claimants of Misc. Case No. 64/70 of 97 Anil Kumar and others are the owners of the above land to the extent of 2/3rd share while the claimant of Misc. Case No. 92/70 of 97 are owners of 1/3rd share. The possession of the above land is said to have taken place some time in the year 1971 for construction of the stadium of Air Force and there was some talk about the settlement of compensation and exchange of land, but this could not be finalised and the case went up to the High Court. The High Court vide order dated 07.02.1996 passed in Civil Misc. Writ Petition No. 23834 of 1995 directed the State Government to acquire the above land under the Land Acquisition Act. Consequently, the notification under section 4 of the Land Acquisition Act was issued on 16.02.1997 and notification under section 6 of the Land Acquisition Act was made on 18.03.1997. The formal possession of the above land is alleged to have been taken on 31.03.1997 and the award was also made on 31.03.1997.In the award the S.L.A.O. Kanpur Nagar found the acquired land as potential for building purpose and awarded compensation at the rate of Rs. 1,000/- per sq. yard. Aggrieved by this award the claimants filed this two references, References Case No. 64/70 of 1997 Anil Kumar and others vs. Union of India and others and Reference Case No.

92/70 of 1997 Deoraj and others vs. State of U.P. and others.

5. It has been alleged by the claimant that the possession of the acquired land was taken in the year 1969 and on the land there were 45 Sheesham Trees. They claimed the market value of the acquired land to be Rs. 5,000/- on the date of notification and the alleged compensation is insufficient and inadequate. It has been further alleged that the acquired land is situate at the heart of Lal Banglow which is highly modernised commercial area abutting to Jajmau area internationally famous for leather and leather goods. It was also alleged that the land was surrounded by roads, markets etc. and on account of dispossession the claimant have suffered a loss and have not been properly awarded interest and solatium.

6. Opposite parties no. 1, 2 and 4 filed common written statement and denied the allegations advanced in the claim petition. But admitted that the acquisition proceedings started as per direction of the Hon'ble High Court in Writ Petition No. 23834 of 1995 and Khasra plots No. 42 and 43 were acquired under the Land Acquisition Act. They further alleged that the compensation awarded by the S.L.A. O. Kanpur is sufficient and adequate and alleged that the acquired land is far from Kanpur City and as such the claimants not entitled for any additional amount.

7. Opposite party No. 3 filed their separate written statement and denied the allegations advanced in the claim petition and alleging that the compensation awarded by the S.L.A.O. Kanpur is sufficient and proper.

The learned court below framed following issue:-

1. Whether the compensation award is inadequate, if yes, at what rate they are entitled to get compensation of the acquired land.

2. On which date possession was claimed by the Government of India and what will be its effect.

3. Whether claimants have not been paid compensation for the *Sheesham* trees situated in the plot, if yes, then to what amounts the claimants are entitled.

4. To what relief if any claimants are entitled.

8. The learned court below after considering the oral and documentary evidence held that the market value of the acquire land was Rs. 1,200/- per sq. yard on the date of notification and thus compensation awarded is insufficient and inadequate. While deciding issue no. 2 learned court below held that possession of the land acquired is taken in the year 1971 and the acquisition was made later on at the direction of the Hon'ble High Court and thus the claimants are entitled for 12% additional amount on the market value of the acquired land from the date of possession i.e. 01.07.1991 till the date of notification i.e. 16.02.1997. While deciding issue no. 3, the court below opined that it has not been proved that there were *Sheesham* trees in the plot, so they are not entitle for any compensation for the trees as alleged in the claim petition. In view of the above findings, issue No. 1 to 4 were decided accordingly.

9. Feeling aggrieved by findings recorded by the reference court on issue no. 1, 2, 3 and 4, Anil Kumar and others have filed First Appeal No. 971 of 1999, Deo Raj and others has filed First Appeal No. 963 of 1999 and State of U.P. has filed First Appeal No. 966 of 1999 and First Appeal No. 967 of 1999.

10. It was argued from the side of Union of India that the learned judge has wrongly and illegally ignored the exemplar sale deed filed by them to the adjoining plot and also wrongly relied upon sale deed which is situated at a distance of more than one Km. for the purpose of enhancing valuation from Rs. 1,000/- to Rs. 1,200/-. It was also argued that the learned lower court has erred in law in calculating the compensation and by giving 12% interest from the date prior to the notification under section 4, because the collector has no jurisdiction to take into consideration any matter relating to the land acquisition prior to notification under section 4/17 of the Land Acquisition Act. The possession contemplated under section 23(1) (a) of the Land Acquisition Act denotes the date of taking possession in pursuance of Notification and not prior to that period. Taking possession under the Land acquisition Act cannot be construed to be anything done or any happening which took place before the Notification.

11. Learned counsel of Anil Kumar and Deoraj argued that the learned court below was wrong as per calculating the mean of the value given of exemplar relied by the Union of India and one of which learned court below has relied. He has further argued that from that mean, decrease of amount by Rs. 50/- is not according to law.

12. From the discussion and argument above, following points are to be decided:-

1. What can be the method of calculation for calculating the compensation?

2. What remedy is available to the claimants, if the possession has been taken prior to the date of notification.

13. A perusal of the impugned judgement reveals that the building potentiality of the acquired land has not been disputed by acquiring body or the State. On the other hand, S.L.A.O. himself was of the opinion that the acquired land was situated in developed locality and as such he awarded Rs. 1,000/- per sq. yard compensation being market value of acquired land. The claimants have alleged that the acquired land is situated abutting Kanpur-Lucknow Highway. They have further alleged in para 10 of the claim petition that the acquired land is situated within the Municipal Limits of Kanpur City and at the heart of Lal Banglow, highly modernised Commercial market abutting to Jajmau area. Even Tayyab Khan, Amin as D.W.1 from the side of Union of India has accepted that towards west of the acquired land there are houses, shops and bye-pass. Towards east side there is a link road, which connects to the G.T. Road. Towards north side a road and after that Vihar Colony, a sub-post-office is there and towards south there is Bangali Colony. Towards east also Air force gate and office are there.

14. In view of this, the reference court was right in holding that the acquired land possessed building potentiality on the date of notification.

15. The S.L.A.O. has awarded the compensation at the rate of Rs. 1,000/- per sq. yard. The claimants have claimed compensation at the rate of Rs. 5,000/- per sq. yd. Claimants have filed several lease and three sale deeds to prove the market value of the acquired land.

16. First sale deed was executed by Bhopendra Singh in favour of Onkar Nath Tripathi in respect of Khasra plot No. 369, area 88 sq. yard of village Muzaffarpur, Kanpur, which was transferred on 27.09.1995. The reference court has not relied upon this exemplar as the sale deed relates to the land of another village Muzaffarpur, Kanpur, while the acquired land is situated in village Shafipur. Another sale deed was filed which was executed by Thakurdin Jaiswal in favour of Smt. Meena Gupta in respect of Khasra plot No. 167, area 144 sq. yd. With some construction over it for consideration of Rs. 3, 20,000/- on 27.11.1996. In this deed the cost of construction has been shown a Rs. 1,02,000/- and the cost of land was shown as Rs. 2,18,000/- This goes to show the market value of the land to be Rs. 1,500/- per sq. yd. Another sale deed was executed by Radhakrishna Pal in favour of Shyam Kishan Ram in respect of house no. 115, area 160 sq. yd. Of village Shafipur for consideration of Rs. 2,25,000/- on 27.11.1992. The court below has rejected this exemplar as this transaction took place much before the date of notification.

17. What the court below has done that it accepted the mean of the two transactions, one relied by S.L.A.O. and another of the sale deed by Thakurdin Jaiswal in favour of Smt. Meena Gupta. Thus, court below come to figure of Rs. 1250/- per sq. feet and by abundant caution, he further decreased the amount by 50% and decided the market value as Rs. 1200/- per sq. yd. On the date of notification.

18. Both the parties have challenged this market value.

19. It has been mentioned itself in the judgement that possession of the above land is said to have been taken some time in the year 1971 for construction of the stadium of Air force and there was some talk about the compensation and exchange of land between the parties, but this could not be finalised and the matter went up to the High Court and the High Court directed the State Government to acquire the above land under the Land Acquisition Act. Consequently, the notification under section 4 of the Land Acquisition Act was issued on 16.02.1997 and notification under section 6 of the Land Acquisition Act was made on 18.03.1997 and the formal possession of the above land has been shown to be taken on 31.03.1997. These circumstance clearly goes to show that at the time of notification of land has already been used for stadium. This fact has also to be considered while determining the market value of the land.

20. In the case of ***Special Land Acquisition Officer vs. Karigowda & others AIR 2010 SC 2322,*** the Apex Court has held that :-

*"By development of law, the Courts have adopted different methods for computing the compensation payable to the land owners depending upon the facts and circumstances of the case. The Courts have been exercising their discretion by adopting different methods, inter alia the following methods have a larger acceptance in law;*

*(a) Sales Statistics Method: in applying this method, it has been stated that, sales must be genuine bona fide, should have been executed at the time proximate to the date of notification under section 4 of the Act, the land covered by the sale must be in the vicinity of the acquired land and land should be comparable to the acquired land. The land covered under the sale instance should have similar potential and occasion as that of the acquired land.*

*(b) Capitalization of Net Income Method; This method has also been applied by the Courts. In this method of determination of market value, capitalization of net income method or expert opinion method has bee applied.*

*(c ) Agriculture Yield Basis Method: Agricultural yield of the acquired land with reference to revenue records and keeping in mind the potential and nature of the land wet (irrigated), dry and barren ( banjar). Normally, where the compensation is awarded on agricultural yield or capitalization method basis, the principle of multiplier is also applied for final determination. These are broadly the methods which are applied by the Courts with further reduction on account of development charges. In some cases, depending upon the peculiar facts, this Court has accepted the principle granting compound increase at the rate of 10% to 15% of the fair market value determined in accordance with law to avoid any unfair loss to the claimants suffering from compulsive acquisition. However, this consideration should squarely fall within the parameters of S. 23 while talking care that the negative mandate contained in S. 24 of the Act is not offended. How on or any of the principles afore stated is to be applied by the Court, would depend on the facts and circumstances of a given case."*

21. In case of ***Anjani Molu Dessai vs. State of Goa and another 2011 3 AWC 2650 SC,*** the Apex Court has held that :-

"The legal position is that even where there are several exemplars with reverence to similar lands, usually the highest of the exemplars, which is a bona fide transaction, will be considered. Where however there are several sales of similar lands whose prices range in a narrow bandwidth, the average thereof can be taken, as representing the market price. But where the values disclosed in respect of two sales are markedly different, it can only lead to an inference that they are with reference to dissimilar lands or that the lower value sale is on account of under-valuation or other price depressing reasons. Consequently averaging can not be resorted to."

22. The above discussion of above case clearly goes to show that if there are several sales of similar lands whose price range in narrow bandwidth, average thereof is to be taken. In the present case, the exemplar relied upon by the S.L.A.O. was Rs. 1,000/-per sq. yard and one relied upon by the reference court was of Rs. 1,500/- per sq. feet, so the value disclosed in the two sales are markedly different.

23. From the above discussion, we are of the view that the sale deed relied upon by the S.L.A.O. ought to have been refused for consideration and the sale deed executed by Thakurdin Jaiswal in favour of Smt. Meena Gupta should have been taken into account.

24. From the above discussion, we are of the view that method used by the reference court was wrong and the market value should have been Rs. 1,500/- per sq. yard and we thus decide the market value of Rs. 1,500/- per sq. yard. Union of India has cited several rulings to show that the claimant are entitled to interest on additional amount from the period of date of section 4 (1) notification and not from the date of taking possession. Union of India has relied upon ***Special Tahsildar (LA), P.W.D. Schemes, Vijayawada vs. M.A. Jabbar (1995) 2 SCC 142, R.L. Jain (D) By LRS vs. DDA and others (2004) 4 SCC 79, Lila Ghosh (Smt.) (Dead) through LR. Tapas Chandra Roy vs. State of W.B (2004) 9 SCC 337, State of Bihar and another vs. Kedar Sao and Another (2004) 9 SCC 344, Ahad Brothers vs. State of MP. And another (2005) 1 SCC 545 and Land Acquisition Officer & Asstt Commissioner and another vs. Hemanagouda and others (2005) 12 SCC 443.***

25. It is admitted that the possession was taken prior to the date of notification. So it is to be examined as to what remedy was available to the claimants and whether the reference court has erred in granting interest from the date of possession.

26. The case of ***R.L. Jain vs. DDA and others*** (supra) is Full Bench decision. In this case, it has been held in para 11, 12 and 12 that :-

**11**-*"In order to decide the question whether the provisions of Section 34 of the Act regarding payment of interest would be applicable to a case where possession has been taken over prior to issuance of notification under section 4 (1) of the act, it is necessary to have a look at the scheme of the Land Acquisition Act. Acquisition means taking not by voluntary agreement but by authority of an Act of Parliament and by virtue of the compulsory powers thereby conferred. In case of acquisition the property is taken by the State permanently and the title to the property vests in the State. The Land Acquisition Act makes complete provision for acquiring title over the land, taking possession thereof and for payment of compensation to the land owner. Part II of th Act deals with acquisition and the heading of Section 4 is " Publication of preliminary notification and powers of officers thereupon". Sub-section (1) of Section 4 provides that whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose or for a company, a notification to that effect shall be published in the Official Gazette and in two daily newspapers circulating in that locality and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality. Sub-section (2) provides that thereupon it shall be lawful for any officer either generally or specially authorised by such Government in this behalf and for his servants and workmen, to enter upon and survey and take levels of any land in such locality, to dig or bore in the subsoil and to do all other acts necessary to ascertain whether the land is adapted for such purpose, etc. etc. This provision shows that the officers and servants and workmen of the Government get the lawful authority to enter upon and survey the land and to do other works only after the preliminary notification under Section 4 (1) has been published. Section 5-a enables a person interested in any land which has been notified under Section 4 (1) to file objection against the acquisition of the*

*land and also for hearing of the objection by the Collector. If the State Government is satisfied, after considering the report, that any particular land is needed for public purposes or for a company, it can make a declaration to that effect under Section 6 of the Act and the said declaration has to be published in the Official Gazette and in two daily newspapers and public notice of the substance of such declaration has to be given in the locality. Thereafter the Collector is required to issue notice to persons interested under Section 9(1) of the Act stating that the Government intends to take possession of the land and that claims to compensation for all interests in such land may be made to him. Section 11 provides for making of an award by the Collector of the compensation which should be allowed for the land. Section 16 provides that when the Collector has mad an award under Section 11, he may take possession of the land which shall thereupon vest absolutely in the Government, free from all encumbrances. This provision shows that possession of the land can be taken only after the Collector has made an award under Section 11. Section 17 is in the nature of an exception to Section 16 and it provides that in cases of urgency, whenever the appropriate Government so directs, the Collector, thought no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in Section 9 (1), take possession of any land needed for a public purpose and such land shall thereupon vest absolutely in the Government, free from all encumbrances. The urgency provision contained in Section 17 (1) can be invoked and possession can be taken over only after publication of notification under Section 9 (1) which itslef can be done after publication of notification under Section 4 (1) and 6 of the Act. Even here in view of sub-section (3-A) the Collector has to tender 80 per cent of the estimated amount of compensation to the persons interested/entitled thereto before taking over possession. The scheme of the Act does not contemplate taking over of possession prior to the issuance of notification under Section 4 (1) of the Act and if possession is taken prior to the said notification it will be dehors the Act. It is for this reason that both Sections 11 (1) and 23 (1) enjoin the determination of the market value of the land on the date of publication of notification under Section 4 (1) of the Act for the purpose of determining the amount of compensation to be awarded for the land acquired under the Act. These provisions show in unmistakable terms that publication of notification under Section 4 (1) is the sine qua non for any proceedings under the Act. Section 34 of the Act, on the basis whereof the appellant laid claim for interest, reads as under:*

*"34. Payment of interest- When the amount of such compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay the amount awarded with interest thereon a the rate of nine per centum per annum for the time of so taking possession until it shall have been so paid or deposited:*

*Provided that if such compensation or any part thereof is not paid or deposited within a period of one year from the date on which possession is taken, interest at the rate of fifteen per centum per annum shall be payable from the date of expiry of the said period of one year on the amount of compensation or part thereof which has*

*not been paid or deposited before the date of such expiry."*

***12-*** *The expression "that Collector shall pay the amount warded with interest thereon at the rate of nine per centum per annum from the time of so taking possession until it shall have been so paid or deposited" should not be read in isolation divorced from its context. The words "such compensation" and " so taking possession" are important and have to be given meaning in the light of other provisions of the Act. "Such compensation" would mean the compensation determined in accordance with other provisions of the Act, namely, Sections 11 and 15 of the Act which by virtue of Section 23 (1) means market value of the land on the date of notification under Section 4 (1) and other amounts like statutory sum under sub-section (1-A) and solatium under sub-section (2) of Section 23. The heading of Part II of the Act is "Acquisition" and there is a sub-heading " Taking Possession" which contains Sections 16 and 17 of the Act. The words "so taking possession" would therefore mean taking possession in accordance with Section 16 or 17 of the Act. These are the only two sections in the Act which specifically deal with the subject of taking possession of the acquired land. Clearly, the stage for taking possession under the aforesaid provisions would be reached only after publication of the notification under Section 4 (1) and 9 (1) of the Act. If possession is taken prior to the issuance of the notification under Section 4 (1) it would not be in accordance with Section 16 or 17 and will be without any authority of law and consequently cannot be recognised for the purposes of the Act. For parity of reasons the words "from the date on which he took possession of the land" occurring in Section 28 of the Act would also mean lawful taking of possession in accordance with Section 16 or 17 of the act. The word "so taking possession" can under no circumstances mean such dispossession of the owner of the land which has been done prior to publication of notification under Section 4 (1) of the Act which is dehors the provisions of the Act.*

***13-*** *In Union of India vs. Budh Singh* ***(1995) 6 SCC 235*** *after analysis of the provisions of the Act the Bench arrived at the following conclusions:* ***(SCC P. 236, para 5)***

*"The parameter for initiation of the proceedings is the publication of the notification under Section 4 (1) of the Act in the State Gazette or in an appropriate case in District Gazette as per the local amendments. But the condition precedent is publication of the notification under Section 4 (1) in the appropriate gazette. That would give legitimacy to the State to take possession of the land in accordance with the provisions of the Act. Any possession otherwise would not be considered to be possession taken under the Act."*

27. In this case, the Apex Court has specifically held that in a case where a land owner is dispossessed prior to issue of earlier notification under section 4 (1) of the Act, the Government merely take possession of he land. It is fully open to the land owner to recover compensation of the land by taking appropriate legal proceedings, therefore, he is only entitled to get rent or damages for use and occupation for the area government has taken possession of the property. Where possession is taken prior to the issues of the preliminary notification it will be just

and adequate that the Collector may also determine rent or damages for use of the property to each of the land owner is entitled while determining the compensation amount payable to the land owner for the acquisition for the property. As the matter is too old hence it will not be proper to remand the matter for such determination. Hence we are of the view that Collector be directed and is so directed to determine such amount as compensation for use and occupation of the land from the date of taking possession till the date of notification i.e. 01.07.1971 till 16.02.1997, within a period of one year from producing a certified copy of this order. If the Collector fails to do so within that period, then it will be open to the claimants to resort to appropriate legal action/remedy.

28. As of discussion above, all four appeals are liable to be partly allowed.

29. F.A. No. 961 of 1999 and F.A. No. 963 of 1999 are partly allowed. The claimants shall be entitled for a compensation of Rs. 1,500/- per sq. yard being the market value of the acquired land. The claimants shall be further entitled for 30% solatium on the enhanced amount.

30. Claimants are further awarded 9% interest on excess amount that has been found due by this Court and that has not been paid by the S.L.A.O., Kanpur Nagar, from the date of notification i.e. 16.02.1997 till the period of one year and after the expiry of the above period, claimants are further entitled for 15% p.a. interest on the above excess sum which has been found due by this court and which has not been awarded by the S.L.A.O. Kanpur Nagar till the date of payment under section 28 of Land Acquisition Act.

31. F.A. No. 966 of 1999 and F.A. No. 967 of 1999 are also partly allowed. The 12% additional amount of the market value from 01.07.1971 to 16.02.1997 i.e. from the date of taking possession to the date of notification which has been allowed by the reference court is disallowed and instead, claimants are entitled to rent/damages as determined by Collector Kanpur Nagar, as directed above.

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**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 08.10.2012**

**BEFORE**
**THE HON'BLE DINESH GUPTA, J.**

FIRST APPEAL No. - 1006 of 2000

**Sri Vikas Pandey ...Applicant**
**Versus**
**Smt. Vandita Gautam ...Respondents**

**Counsel for the Petitioner:**
Sri Rajesh Tandon
Sri Komal Mehrotra
Sri Manoj Kumar Sharma
Sri Some Narayan Mishra

**Counsel for the Respondents:**
Sri P.K. Jain

**Hindu Marriage Act, 1955-Section-18-Maintenance-whether a divorced wife-possessing much better financial and academic position than the husband-competent to maintain herself-entitled to claim maintenance? held-"No"**

**Held: Para-18**

**The word 'unable' means that a person is not able to do what he is supposed to do. In the present matter, it is not a case that the wife is an illiterate lady or is not in a position to do any job, on the contrary the wife is highly educated particularly more than the husband and**

**is clearly in a position to earn more. This also disentitles her to get any maintenance. Therefore, in view of the legal and factual aspects of the matter, plaintiff-respondent is not entitled to any maintenance and the decree of maintenance awarded by the trial court is liable to be set aside and the appeal deserves to be allowed.**

**Case law discussed:**

(1993) 3 Supreme Court Cases 406; AIR Bombay 2005 page 180

(Delivered by Hon'ble Dinesh Gupta, J.)

1. This appeal has been preferred by the appellant against the judgment and decree dated 30.11.2000 passed by Sri V.K.Jaiswal, III Additional District Judge, Muzaffar Nagar in Original Suit No.351 of 1997 Smt. Vandita Gautam vs. Sri Vikas Pandey.

2. The brief facts giving rise to this appeal are that the plaintiff-respondent filed Original Suit No.351 of 1997 against the defendant-appellant u/s. 18 of the Hindu Adoption and Maintenance Act ( in brief Act) with the allegations that -

- The plaintiff-respondent was married on 21.6.1991 with the defendant-appellant at his residential house at Dehradun. Her family members spent an amount of Rs. 4, 50,000/- in the marriage and sufficient articles, gift and dowry was given at the time of the marriage, but the family members of the defendant-appellant were not happy with the amount spent in the marriage and further demanded a car in dowry. However, the plaintiff-respondent explained to the defendant-appellant and his family members regarding financial status of her family that they were not in a position to provide a car.

- When the demand of the defendant-appellant and his family members were not met, they threw the plaintiff-appellant out of their house and sent the plaintiff-respondent to her parental house at Meerut and at present she is living with her mother at Meerut. All the articles, clothes, ornaments etc. given by the family members of the plaintiff-appellant were kept by the defendant-appellant and his family members.

- In November, 1996 the plaintiff-respondent came to know that the defendant-appellant obtained an ex-parte decree from the court of Civil Judge, Dehradun and an application to restore the proceedings has already been moved by the plaintiff-respondent which is pending.

- The defendant-appellant has not taken care of the plaintiff-respondent since 27.6.1991 and has not given her any amount of maintenance and the plaintiff-respondent is living with her widowed mother. Though the plaintiff-respondent is a literate lady having no means to maintain herself, she is not doing any service and factually she is a burden on her parents.
- The defendant-appellant is a senior Geologist in Oil and Natural Gas Commission and at present he is posted in District-Shiv Sagar (Assam) and is getting

Rs.15000/- per month as salary and he can easily pay a sum of Rs.5000/-to his wife to maintain herself.

- The plaintiff-respondent is also entitled to get the maintenance of Rs.5000/- per month which the defendant-appellant is liable to pay.

- The plaintiff-appellant has also come to know that the defendant-appellant has performed second marriage with some lady named Kalpana. However, the plaintiff-respondent reserved her right to file a civil suit in this regard.

3. The defendant-appellant filed written statement and denied all the allegations made in the plaint and submitted that-

- The marriage between the defendant-appellant and plaintiff-respondent was solemnized on 21.6.1991 at Meerut according to Hindu rites and rituals. It was also admitted that after the marriage the plaintiff-respondent lived with him for certain period at Dehradun. However, it was denied that Rs.4.5 lacs was spent in the marriage. It was also denied that the plaintiff-respondent was thrown out of the house by the defendant-appellant without any clothes and ornaments. In fact whatever ornaments were given in the marriage the same was taken away by the plaintiff-appellant.

- It was also denied that the defendant-appellant or his family member ever demanded any dowry or ill-treated the plaintiff-respondent. The real facts are that soon after the marriage the behaviour of the plaintiff-respondent with the defendant-appellant and his family members was not proper and she left the house of her own free will and is living with her mother at Meerut.

- The defendant-appellant filed a suit for divorce and the plaintiff-respondent after receipt of notice appeared before the court but later on deliberately absented herself and the court was compelled to pass a decree of divorce between the parties. The plaintiff-respondent did not file any appeal against the decree of divorce dated 26.11.1993.

- The allegation in the plaint that the plaintiff is living with her mother, she is not doing any job and is not having any means is wrong. In fact, the plaintiff-respondent is a highly educated lady with M.A. in English and B.Ed.and is at present also doing Ph.D. and she is a teacher earning at least Rs.5000/- per month from tuition and the job of a teacher.

- It is not denied that the defendant-appellant is a Geologist in Oil and Natural Gas Commission. However, he gets only Rs.10000/- as monthly pay and after the decree of divorce he has already married one Alpana and at present is living in Assam with his wife and one daughter. The demand of

Rs.5000/- per month as maintenance is wholly excessive. In fact the behaviour of the plaintiff-respondent with the defendant-appellant soon after the marriage was very cruel and unnatural and because of this the defendant-appellant was compelled to file a suit for divorce which was decreed and the plaintiff-respondent preferred no appeal against the same and the suit is liable to be dismissed.

4. On the pleading of the parties, the trial court framed the following issues:-

- Whether the plaintiff has no sufficient means to maintain herself?
- Whether the defendant neglected his wife in her proper maintenance?
- To what relief the plaintiff entitled? And
- Whether the plaintiff is entitled to any amount of maintenance?

5. In support of his allegation the plaintiff-respondent examined herself as P.W.1while the defendant-appellant examined himself as D.W.1 and also filed some documentary evidence including some letters written by the mother of the plaintiff-respondent.

6. After hearing the parties and considering the evidence on record, the trial court decreed the suit of the plaintiff and granted maintenance of Rs.3000/- per month to her.

7. Feeling aggrieved, the defendant-appellant has filed this appeal.

8. At the time of hearing, learned counsel for the parties were present. However, Sri P.K.Jain, learned counsel for the plaintiff-respondent submitted that he tried his level best to contact the plaintiff-respondent but he did not receive any response from her. In this view of the matter, the court has been left with no option but to decide the appeal ex-parte.

9. Learned counsel for the defendant-appellant submitted that -

- The trial court has decreed the suit without taking into consideration the provisions mentioned in clause (a) to (g) of Section 18(2) of the Act.

- The plaintiff-respondent was not entitled to any maintenance u/s. 18 of the Act after decree of divorce.

- The defendant-appellant was not guilty of desertion, cruelty and living with another wife which is mandatory for grant of maintenance u/s. 18 of the Act.

- The divorce was granted only on the ground that the plaintiff-respondent was not able to maintain cordial relation with the family members of the defendant-appellant.

- In order to grant a decree u/s. 18 of the Act, it was mandatory for the plaintiff to prove the ingredients contained in clauses (a) to (g) of sub section(2) of Section 18 of the Act.

- The capacity to earn by the

plaintiff-respondent has been fully ignored by the trial court while granting maintenance to her.

- The defendant-appellant has proved by documentary evidence that the plaintiff-respondent being a literate lady and doing job of a teacher and earning more than Rs.5000/- per month was not entitled to the maintenance.

9. Even at the appellate stage by means of supplementary affidavit the defendant-appellant has filed documents to show that the plaintiff-respondent is continuously doing job as lecturer since the year 2000 in Radha Govind Engineering College, Grah Road, Meerut in the Department of Humanities and thereafter she is employed in Moti Lal Nehru College, University of Delhi, South Campus, Delhi in English department and at no point of time she had got less than Rs.10,000/- per month as salary which is more than sufficient to maintain herself. She is highly educated being M.A. in English with B.Ed. and also having Doctorate degree. Learned counsel referred to the statement of the plaintiff-respondent in which she admitted that at the time of giving that statement she was doing Ph.D.

10. Learned counsel for the defendant-appellant further submitted that the trial court has wrongly considered the legal position that even a divorced lady is also entitled to maintenance u/s. 18 of the Act and has wrongly relied on the judgment in the case of Vitthal Mangal Das Patil vs. Mayaben Patel (1996) DMC 432. The said authority was not at all applicable in the present case. In that case the court held that u/s. 25 of the Hindu Marriage Act the word 'wife' includes a divorced wife and putting the same analogy to Section 18 of the Act the court presumed that it also included 'divorcee wife'.

11. Learned counsel for the appellant further argued that the trial court has also taken a wrong view of the fact that the plaintiff-respondent has already applied for setting aside the ex-parte decree of divorce while in fact after the decree of divorce although an application being Misc. Case No.201/1996 was moved by the plaintiff-respondent to restore the original suit but the same was rejected vide order dated 9.9.1985 which clearly shows that the divorce decree is still maintained and has not been set aside and the plaintiff-respondent is admittedly a divorcee and is not entitled to any maintenance u/s. 18 of the Act.

12. Learned counsel for the appellant relied upon **Chand Dhawan (Smt)** Vs**. Jawahar Lal Dhawan (1993) 3 Supreme Court Cases 406** and submitted that the apex court clearly held that a divorcee cannot get maintenance u/s. 18 of the Hindu Marriage Act. In a recent case **Mrs. Manisha Sandeep Gade** Vs. **Sandeep Vinayak Gade, AIR Bombay 2005 page 180** the Bombay High Court also took the same view and clearly held that after grant of divorce, the wife is not entitled to maintenance.

13. Lastly learned counsel argued that since the decree of divorce has not been set aside as yet, the plaintiff-respondent is not entitled to any maintenance u/s. 18 of the Act and the trial court has wrongly decreed the suit.

14. So far as legal position is concerned, admittedly a divorce decree was passed between the parties and an application to set aside that decree was also rejected. There is no documentary evidence produced by the plaintiff-respondent to show that the said divorce decree has been set aside or any proceeding is pending to set aside that divorce decree. Hence, for all purposes the plaintiff-respondent is a divorcee and according to Section 18 of the Act the word 'wife' does not include a 'divorcee wife' and as such she is not entitled to any maintenance. The case laws fully supports the contention of learned counsel for the defendant-appellant.

15. In Mrs. Manisha Sandeep Gode (supra) it was clearly held that the trial court was equally right in rejecting the petition for maintenance u/s. 18 of the Act. This was because once the divorce was granted the petition u/s. 18 of that Act could not be maintained.

16. So far as the case law relied on by the trial court Vitthal Mangal Das is concerned, I am of the view that the trial court has taken a wrong approach in interpreting the said authority and wrongly came to the conclusion that the word 'wife' mentioned in Section 25 of the Hindu Marriage Act is similar to the word 'wife' mentioned in Section 18 of the Act.

17. So far as the merit of the appeal is concerned, the appellant has proved by documentary evidence that the plaintiff-respondent being a highly educated lady and engaged as lecturer in different colleges at different time, was receiving salary much more than the appellant.

18. The Bombay High Court has also held that the wife is not entitled to maintenance when it was clearly established that the income of the wife was better than the husband. It is also important to mention here that Section 18 of the Act or Section 25 of the Hindu Marriage Act deals with the situation where the wife is unable to maintain herself. The word 'unable' means that a person is not able to do what he is supposed to do. In the present matter, it is not a case that the wife is an illiterate lady or is not in a position to do any job, on the contrary the wife is highly educated particularly more than the husband and is clearly in a position to earn more. This also disentitles her to get any maintenance. Therefore, in view of the legal and factual aspects of the matter, plaintiff-respondent is not entitled to any maintenance and the decree of maintenance awarded by the trial court is liable to be set aside and the appeal deserves to be allowed.

19. In the result, the appeal succeeds and is allowed. The judgment and decree dated 30.11.2000 passed by III Additional District Judge, Muzaffar Nagar in Original Suit No.351 of 1997 Smt. Vandita Gautam vs. Sri Vikas Pandey is hereby set aside.

20. There shall be no order as to costs.

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**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 26.11.2012**

**BEFORE**
**THE HON'BLE ARVIND KUMAR TRIPATHI (II), J.**

Criminal Appeal No. - 1097 of 2005

**Malhoo and another ...Applicant**
**Versus**
**The Iind Addl.Session Judge,Sultanpur.& Another ...Respondents**

**Counsel for the Petitioner:**
Sri Hrish Chandra

**Counsel for the Respondents:**
Govt. Advocate

**Code of Criminal Procedure-Section 446-recovery of sureties amount-without recording satisfaction for forfeiture of sureties amount-without show cause notice before passing recovery order-held-order not sustainable-quashed.**

**Held: Para-6**

**A perusal of the impugned order again reveals that no show cause notice to the sureties was issued, directing them to show cause as to why their sureties amount be not forfeited. Apex Court in the case of Ghulam Mehdi Vs. State of Rajasthan reported in A.I.R. 1960 SC 1185 and this Court in the case of Mahmood Hasan Vs. State reported in 1979 Cr.L.J. 1439 has held that Section 446 deals with two stages. The first stage requires the ground of satisfaction to be recorded by the Judge or Magistrate concerned for ordering forfeiture and after recording such forfeiture show cause is to be issued. An order for recovery can be made only on fulfilling the two steps contemplated by Section 446. Where no opportunity has been given to show cause why he should not be made to pay, the proceedings cannot be said to be in accordance of law and should be quashed.**

**Case Law discussed:**
A.I.R. 1960 SC 1185; 1979 Cr.L.J. 1439

(Delivered by Hon'ble Arvind Kumar Tripathi (II), J.)

1. List has been revised.

2. None appeared for the appellants Malhoo and Siraj Ahmad. Learned AGA is present.

3. Heard learned AGA and gone through the record.

4. This appeal has been filed against the order dated 2.8.2005 passed by the Additional Sessions Judge, Court No. 2, Sultanpur, in a proceeding under Section 446 Cr.P.C., by which bail bond of accused were forfeited and sureties were directed to deposit the security amount of Rs. 25,000/- of accused Raj Bahadur in Session Trial No. 251 A/95, under Section 302 I.P.C. of Police Station Kotwali Dehat, District Sultanpur.

5. A perusal of the impugned order, which is on record, reveals that the sureties were seeking time to produce the accused but they were not able to produce the accused persons in the court so in that continuation, on 2.8.2005, they again moved an application for time to produce accused persons. This application was rejected and warrant of realisation was issued against sureties Malhoo and Siraj Ahmad.

6. A perusal of the impugned order again reveals that no show cause notice to the sureties was issued, directing them to show cause as to why their sureties amount be not forfeited. Apex Court in the case of **Ghulam Mehdi Vs. State of Rajasthan** reported in A.I.R. 1960 SC 1185 and this Court in the case of **Mahmood Hasan Vs. State** reported

in 1979 Cr.L.J. 1439 has held that Section 446 deals with two stages. The first stage requires the ground of satisfaction to be recorded by the Judge or Magistrate concerned for ordering forfeiture and after recording such forfeiture show cause is to be issued. An order for recovery can be made only on fulfilling the two steps contemplated by Section 446. Where no opportunity has been given to show cause why he should not be made to pay, the proceedings cannot be said to be in accordance of law and should be quashed.

7. In view of the above, the recovery order is liable to be quashed and hereby quashed.

8 The appeal is ***disposed of*** finally with a direction to the court concerned to issue show cause notice to the sureties to show cause as to why their sureties bond be not forfeited.

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**REVISIONAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 05.11.2012**

**BEFORE**
**THE HON'BLE MANOJ MISRA, J.**

Criminal Revision No. - 1557 of 2012

**Pravin Kasana & Others ...Applicant**
**Versus**
**State Of U.P ...Respondents**

**Counsel for the Petitioner:**
Sri Vijaya Prakash

**Counsel for the Respondents:**
Govt. Advocate
Sri Sukhendu Pal Singh
Sri Tej Pal

**Code of Criminal Procedure-Section 167 (2) proviso-Bail application expressing willingness to furnish security for-rejected by Magistrate saying charge sheet filed on same day hence right to be released on-extinguished-application rejected as not maintainable-not vitiated in any manner-no illegality or impropriety on jurisdictional error found-revision dismissed.**

**Held: Para-18**

**To test the aforesaid submission of the learned counsel for the revisionists, I have carefully read the counter-affidavit dated 03.09.2012 filed by Devi Ram Gautam, the Investigating Officer, on behalf of the State. A perusal of the counter-affidavit indicates that the investigation was completed as well as the charge-sheet prepared by 31.03.2012. Thereafter by the order of the Senior Superintendent of Police, Ghaziabad, the Investigating Officer was transferred on 02.04.2012. It appears that the Constable Pairokar, Jarman Singh, had directly submitted the charge-sheet in court on 02.05.2012 and the court also took cognizance on the said charge-sheet. From the affidavit so filed, it cannot be said that the charge-sheet was incomplete. Even otherwise, there is no challenge to the charge-sheet either in the revision or by way of any collateral proceedings. As regards the direct filing of the charge-sheet, through a Constable, it may be an irregularity, but it would certainly not vitiate the charge-sheet and the order taking cognizance thereon.**

**Case Law discussed:**
(2001) 5 SCC 453; [2011 (72) ACC 767]; [2011 (75) ACC 134]; [2011 (75) ACC 992]; (1996) 1 SCC 432; (1994) 5 SCC 410; 1997-JIC-0-127

(Delivered by Hon'ble Manoj Misra, J.)

1. I have heard Sri Vijaya Prakash for the revisionists, Shri Sukhendu Pal Singh for the informant and the learned A.G.A. for the State.

2. By this revision, the revisionists have challenged the order dated 02.05.2012 passed by Chief Judicial Magistrate, Ghaziabad by which the application of the revisionists seeking for being released on bail, under the proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure (hereinafter referred to as 'Code'), with reference to Case Crime No. 109 of 2012, under Sections 147 /148 /149 /34 /302 I.P.C., P.S. Sahibabad, District Ghaziabad, has been rejected.

3. The undisputed date of first remand was 01.02.2012 and the police did not submit any charge-sheet by 01.05.2012 i. e. within 90 days from the date of the first remand, accordingly, on 02.05.2012, the revisionists applied under the proviso to sub-section (2) of Section 167 of the Code for being released on bail by expressing their willingness to furnish security for bail. The learned Magistrate rejected the application on the same day holding that the charge-sheet has been filed and cognizance taken on the charge-sheet, therefore, the right to be released on bail, under the proviso to sub-section (2) of Section 167 of the Code stood extinguished.

4. Challenging the aforesaid order, the learned counsel for the revisionists, placing reliance on certain comments/notes /reports made on the margin of the order-sheet, contended that initially the report on the bail application indicated that no charge-sheet has been filed within 90 days, whereas the subsequent report indicated that charge sheet has just been submitted, which suggested that after the revisionists had availed of their right for being released on bail that the charge-sheet was submitted, on 02.05.2012, which could not defeat the right of the revisionists to be enlarged on bail in the light of the decision of the Apex Court in the case of **Uday Mohanlal Acharya v. State of Maharashtra** reported in **(2001) 5 SCC 453**. In the alternative, it was contended that the charge-sheet was incomplete and was not filed in the manner provided by Regulation 122 of the U.P. Police Regulation and, as such, it was no charge-sheet in the eye of law. The alternative submission though was made orally, but there is no challenge to the validity of the charge-sheet either in the memo of this revision or by way of an appropriate application seeking to challenge the charge-sheet. The learned counsel for the revisionists placed heavy reliance on certain observations made by the Apex Court in paragraph 13 of **Uday Mohanlal Acharya's case (supra),** wherein it was observed as follows:-

***"..... A conspectus of the aforesaid decisions of this Court unequivocally indicates that an indefeasible right accrues to the accused on the failure of the prosecution to file the challan within the period specified under sub-section (2) of Section 167 and that right can be availed of by the accused if he is prepared to offer the bail and abide by the terms and conditions of the bail, necessarily, therefore, an order of the Court has to be passed. It is also further clear that that indefeasible right does not survive or remain enforceable on the challan being filed, if already not availed of, as has been held by the Constitution Bench in Sanjay Dutt's case (supra). The crucial question that arises for consideration, therefore, is what it the true meaning of the expression 'if already not availed of'? Does it mean that an accused files an application for bail and offers his willingness for being***

***released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression 'availed of' to mean actually being released on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167(2) of the Criminal Procedure Code and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. If the expression 'availed of' is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a charge-sheet then also the so called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature have given its mandate it would be the bounded duty of the Court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression 'if not availed of' in a manner which is capable of being abused by the prosecution..... In interpreting the expression 'if not availed of' in the manner in which we have just interpreted we are conscious of the fact that accused persons in several serious cases would get themselves released on bail, but this is what the law permits, and that is what the legislature wanted and an indefeasible right to an accused flowing from any legislative provision ought not to be defeated by a Court by giving a strained interpretation of the provisions of the Act. In the aforesaid premises, we are of the considered opinion that an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail, that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. In our view, such interpretation would subserve the purpose and the object for which the provision in question was brought on to the Statute Book. In such a case, therefore, even if the application for consideration of an order of being released on bail is posted before the Court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting formal order of***

***being released on bail in enforcement of his indefeasible right, then filing of challan at that stage will not take away the right of the accused. Personal liberty is one of the cherished object of the Indian Constitution and deprivation of the same can be only in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody upto a maximum period as indicated in the proviso to sub-section (2) of Section 167, any further detention beyond the period without filing of challan by the Investigating Agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution. There is no provision in the Criminal Procedure Code authorising detention of an accused in custody after the expiry of the period indicated in the proviso to subsection (2) of Section 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail. It is in this sense it can be stated that if after expiry of the period, an application for being released on bail is filed, and the accused offers to furnish the bail, and thereby avail of his indefeasible right and then an order of bail is passed on certain terms and conditions but the accused fails to furnish the bail, and at that point of time a challan is filed then possibly it can be said that the right of the accused stood extinguished. But so long as the accused files an application and indicates in the application to offer bail on being released by appropriate orders of the Court then the right of the accused on being released on bail cannot be frustrated on the oft chance of Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and a challan is filed in interregnum. This is the only way how a balance can be struck between the so called indefeasible right of the accused on failure on the part of the prosecution to file challan within the specified period and the interest of the society, at large, in lawfully preventing an accused for being released on bail on account of inaction on the part of the prosecuting agency. On the aforesaid premises, we would record our conclusions as follows:-***

***1. Under sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days in the whole.***

***2. Under the proviso to aforesaid sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.***

***3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the Investigating Agency in the completion of the investigation within the period prescribed***

***and the accused is entitled to be released on bail, if he is prepared to an furnish the bail, as directed by the Magistrate.***

***4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the Investigating Agency in completion of the investigation within the specified period, the Magistrate/Court must dispose it of forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the Investigating Agency. Such prompt action on the part of the Magistrate/Court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the Investigating Agency in completing the investigation within the period stipulated.***

***5. If the accused is unable to furnish bail, as directed by the Magistrate, then the conjoint reading of Explanation I and proviso to sub-section 2 of Section 167, the continued custody of the accused even beyond the specified period in paragraph (a) will not be unauthorised, and therefore, if during that period the investigation is complete and chargesheet is filed then the so-called indefeasible right of the accused would stand extinguished.***

***6. The expression 'if not already availed of' used by this Court in Sanjay Dutt's case (supra) must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in paragraph (a) of proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail, on being directed, then it has to be held that the accused has availed of his indefeasible right even though the Court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.***

***With the aforesaid interpretation of the expression 'availed of' if charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section (2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is field, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with Section 209 and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of cancellation of bail, already granted in accordance with law laid down by this Court in the case of Mohd. Iqbal vs. State of Maharashtra (supra)."***

5. Relying on the aforesaid observations made by the apex court, and on conclusion Nos. 4 and 6, in particular, the learned counsel for the revisionists contended that since the revisionists had applied for bail and by that time no charge-sheet was filed, and the revisionists had also offered to furnish bail bonds, they had availed of their right under the proviso to sub-section (2) of Section 167 of the Code, therefore, their right had become indefeasible and, even if the charge-sheet was submitted later in the day, the revisionists were entitled to be given statutory benefit and be enlarged on bail.

6. Per contra, the learned A.G.A as also the learned counsel for the informant submitted that it has not come on the record that at what time the charge-sheet or the bail application was filed. It has been contended that as per the Conclusion No. 4 in the case of **Uday Mohanlal Acharya's case (supra)**, when an application for bail is filed by an accused for enforcement of his right provided under the proviso to sub section (2) of Section 167 of the Code, the Magistrate / Court must dispose it of forthwith, ***on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the Investigating Agency.*** It has been contended that in the instant case, the learned Magistrate on the application apparently called for report and was satisfied that the charge-sheet had already been filed, accordingly, it rejected the application for bail. It has been contended that the satisfaction of the learned Magistrate was based on the appreciation of the reports placed before him and, as such, satisfaction is not amenable to scrutiny by the revisional Court. It was contended that the comments/ notes made on the order-sheet that the charge-sheet has just been filed cannot be taken as a basis to assume that the charge-sheet was filed after the filing of the bail application. Moreover, since the time of presentation of the bail application and the time of filing of the charge-sheet was not entered on record, therefore, in such as situation, the satisfaction of the learned Magistrate cannot be said to be against the record so as to justify interference with the order.

7. Learned A.G.A. as also the learned counsel for the informant placed reliance on a decision of this court in the case of **Chandra Pal v. State of U.P. : [2011 (72) ACC 767]** as well as in the case of **Sukhai and another v. State of U.P. : [2011 (75) ACC 134],** wherein it was held that if the charge-sheet was filed on the same day when the bail application was presented then, in such a situation, the right to be released on bail under the proviso to sub-section (2) of Section 167 of the Code stands extinguished. Relying on the decision of this court in the case of **Chandra Pal v. State of U.P.(supra),** it was contended that in that case also there were two reports, one with regard to filing of the charge-sheet and the other with regard to non-filing of the charge-sheet, but as it was proved that on the same day charge sheet was filed, the court took the view that the applicant was not entitled to the benefit of the proviso to sub-section (2) of Section 167 of the Code.

8. The learned counsel for the informant had also drawn the attention of the court to the decision of the Apex Court in the case of **Sadhwi Pragyna Singh Thakur v. State of Maharashtra : [2011 (75) ACC 992]**. In paragraph 23 of the judgment, the Apex Court after noticing the various decisions observed as follows:-

*"23. From the discussion made above, it is quite clear that even if an application for bail is filed on the ground that charge sheet was not filed within 90 days, before the consideration of the same and before being released on bail if charge sheet is filed, the said right to be released on bail, can be only on merits. So far as merits are concerned the learned counsel for the appellant has not addressed this Court at all and in fact bail is not claimed on merits in the present appeal at all."*

9. Relying on the aforesaid observation of the Apex Court, the learned counsel for the informant submitted that even if it is accepted that the charge sheet was filed after filing of the bail application, though on the same day, since no orders were passed on the bail application of the revisionists and in the meantime the charge-sheet was filed, the revisionists could only seek for bail on merits and their right to obtain bail under the proviso to sub-section (2) of Section 167 of the Code stood extinguished.

10. The learned counsel for the revisionists in reply to the observations of the Apex Court made in paragraph 23 of **Sadhwi Pragyna Singh Thakur's case (supra),** submitted that it cannot be taken as a binding precedent as it is contrary to the view expressed by a larger Bench of the apex court in the case of **Uday Mohanlal Acharya (supra),** where in conclusion Nos. 4 and 6 the apex court had clearly pointed out that after the right is availed of then it becomes indefeasible irrespective of whether any orders have been passed on the application or not.

11. Having considered the rival submissions of the learned counsel for the parties, the fact that is undisputed is that the charge-sheet was laid after 90 days and on the same day when the application seeking bail, under the proviso to sub-section (2) of Section 167 of the Code, was presented. During the proceedings before this court, by order dated 13.09.2012 the Chief Judicial Magistrate, Ghaziabad was directed to appear in person. Pursuant to the order dated 13.9.2012, the Chief Judicial Magistrate, Ghaziabad appeared in person on 01.10.2012. He made a statement before the Court that there was no record to disclose as to at what time the charge-sheet was received in the court and as to what time the bail application was filed. He submitted that from the record it does appear that the charge-sheet as well as the bail application were both filed on the same day. The record is, therefore, silent as to whether the charge-sheet had been laid prior to the filing of the bail application or not.

12. The learned counsel for the revisionists laid much stress on the comments/ notes made in the margin of the order-sheet, containing the order dated 02.05.2012, wherein certain remarks were made purportedly by the APO, as well as the concerned clerk, indicating that the initial impression was that the charge-sheet had not been filed, but the subsequent report indicated that the charge-sheet was filed and cognizance was taken. Relying on the discrepancy in the remarks, the learned counsel for the revisionists submitted that the charge-sheet was hurriedly filed after the bail application was presented, just to defeat the right of the revisionists.

13. Since there is no reliable or concrete material on record to show that the charge-sheet was filed after filing of

the bail application, the remarks that were made by the concerned clerks or the APO could only be taken as material for the Magistrate concerned to draw satisfaction with regards to the filing or non filing of the charge sheet. As the learned Magistrate had taken these contradictory remarks into consideration and formed an opinion, on the same day itself, that the charge-sheet was filed and that cognizance was taken, the satisfaction of the learned Magistrate in this regard is not open to scrutiny by the revisional court. In the case of **State through C.B.I. v. Mohd. Ashraft Bhat and Another : (1996) 1 SCC 432,** the Apex Court was confronted with a similar sort of a situation. In that case, the apex court found that while the claim for bail was being examined the police report stood filed. Relying on the decision of the Constitution Bench in the case of **Sanjay Dutt v. State through CBI : (1994) 5 SCC 410,** the Apex court held that the right to seek for bail stood extinguished consequent to the filing of the charge-sheet. The judgment of the apex court in the **State through C.B.I. v. Mohd. Ashraft Bhat and Another (supra)** was noticed by the larger Bench in the case of **Uday Mohanlal Acharya (supra)** as would be evident from reading of paragraph No.9 of the report, wherein it was observed, as follows:-

*"9. In **State through CBI vs. Mohd. Ashraft Bhat : (1996) 1 SCC 432,** the Presiding Officer of the Designated Court granted bail to the accused on a finding that the prosecution had failed to submit the police report within the period prescribed. This Court set aside the order on a conclusion that on the date the Designated Court granted bail to the respondent/accused, the prosecution had already submitted the Police Report and, therefore, as held by the Constitution Bench in **Sanjay Dutt (supra)** the right of the accused stood extinguished."*

14. In the case of **Uday Mohanlal Acharya (supra)**, the apex court while laying down guidelines, in conclusion No. 4, in particular, took the view that when an application for bail is filed by an accused for enforcement of his right alleged to have been accrued in his favour on account of default on the part of the Investigating Agency in completion of the investigation within the specified period, the Magistrate / Court must dispose it of forthwith, ***on being satisfied*** *that in fact the accused has been in custody for the period of 90 days or 60 days, as specified, and no charge-sheet has been filed by the Investigating Agency*. **From above, it is clear that before disposing of the bail application, under the above provision, the Magistrate has to be satisfied on two counts: (a) with regard to the period of the custody of the applicant; and (b) whether any charge-sheet has been filed by the Investigating Agency.**

15. In the instant case, the Magistrate applied its mind to the record available before it and on the day of presentation of the bail application, upon examining the parameters required for grant of such bail, found that the charge-sheet had already been filed and cognizance had been taken, therefore, it rejected the application as not maintainable. In the given circumstances, the satisfaction of the learned Magistrate that charge sheet had already been filed and, therefore, the relief under the proviso to sub section (2) of Section 167 of the Code cannot be granted, is a view permissible in law and is not vitiated in any manner, particularly, in the light of the judgment of the apex court in the case of

State through C.B.I. v. Mohd. Ashraft Bhat and Another (supra), which was noticed by the larger Bench in the case of Uday Mohanlal Acharya (supra).

16. The contention on behalf of the revisionists, by relying on certain comments made on the margin of the order sheet or the bail application as the case may be, that the charge sheet was filed after the revisionists had availed of their right, cannot be accepted inasmuch as those comments/ remarks are made only to enable the Magistrate concerned to draw his satisfaction. It is for the Magistrate to be satisfied on the basis of such material. Once the Magistrate takes notice of the remarks/ comments and records his satisfaction, on the day of presentation of the bail application itself, that the charge sheet has been filed, the revisional court cannot scrutinize the merit of such satisfaction. Accordingly, I do not find any illegality in the order impugned.

17. The learned counsel for the revisionists, in the alternative, contended that the charge-sheet submitted was incomplete inasmuch as it does not disclose any other eye witness than the informant even though the presence of other witnesses was also shown in the first information report. It was submitted that the charge-sheet was submitted through a Constable, and not an officer authorized as provided by Regulation 122 of the U.P. Police Regulation, therefore, the said charge-sheet is liable to be ignored and, as such, its filing cannot defeat the right of the revisionists to obtain bail under the proviso to sub-section (2) to Section 167 of the Code.

18. To test the aforesaid submission of the learned counsel for the revisionists, I have carefully read the counter-affidavit dated 03.09.2012 filed by Devi Ram Gautam, the Investigating Officer, on behalf of the State. A perusal of the counter-affidavit indicates that the investigation was completed as well as the charge-sheet prepared by 31.03.2012. Thereafter by the order of the Senior Superintendent of Police, Ghaziabad, the Investigating Officer was transferred on 02.04.2012. It appears that the Constable Pairokar, Jarman Singh, had directly submitted the charge-sheet in court on 02.05.2012 and the court also took cognizance on the said charge-sheet. From the affidavit so filed, it cannot be said that the charge-sheet was incomplete. Even otherwise, there is no challenge to the charge-sheet either in the revision or by way of any collateral proceedings. As regards the direct filing of the charge-sheet, through a Constable, it may be an irregularity, but it would certainly not vitiate the charge-sheet and the order taking cognizance thereon.

19. The learned counsel for the revisionists placed reliance on a decision of this court in the case of **Dharmendra Tripathi v. State of U.P.: 1997-JIC-0-127,** wherein this court had quashed the charge-sheet which was hurriedly filed just to avoid the benefit of the proviso to sub-section (2) of Section 167 of the Code to the accused. Since in the instant case, there is no challenge to the charge-sheet, as was in the case of D**harmendra Tripathi (supra),** the charge-sheet cannot be ignored, particularly, in view of the statement of the Investigating Officer made on affidavit.

20. For the reasons aforesaid, I do not find any illegality, impropriety or jurisdictional error in the order passed by the court below. The revision is,

accordingly, **dismissed.** This shall be without prejudice to the right of the revisionists to seek for bail on merits.

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**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 13.09.2012**

**BEFORE**
**THE HON'BLE RAJES KUMAR, J.**

Criminal Appeal U/S 374 CR.P.C. No. - 1840 of 1982

**Goonga ...Applicant**
**Versus**
**State of U.P. ...Respondents**

**Counsel for the Petitioner:**
Sri S.A.N. Saha

**Counsel for the Respondents:**
A.G.A.

**Criminal Appeal-against conviction with 3 years rigorous imprisonment for offence under section 307 I.P.C. On ground with similar facts with identical rule-other 3 accused-given benefit of doubt-Appellant be also treated likely-otherwise considering 30 years old matter-by conversing offence under section 307 into 324 I.P.C.-be released on probation-held-considering crime should not go unpunished-not a fit case for conversion-conviction by Trial Court-upheld.**

**Held: Para-11**

**However, the fact remains that when all the four accused persons have been identified to be involved in the incident and named in the First Information Report, the view of the Trial court in giving benefit of doubt to three accused does not appear to be reasonable, but since the matter is quite old, it would not be appropriate to reopen the case against three accused persons, who have been acquitted, but on the basis of the evidences on record, there is no doubt that the fire was shot by the appellant Goonga @ Noor Ilahi, which caused serious injuries, fatal in nature and may result into the death of the injured, Altaf Husain, therefore, the appellant has rightly been convicted under Section 307 of the IPC by the Trial court.**

(Delivered by Hon'ble Rajes Kumar, J.)

1. This is an Appeal by the accused Goonga @ Noor Ilahi, who has been convicted by the Trial court for three years rigorous imprisonment by the judgement dated 14.7.1982, passed in Session Trial No. 150 of 1982.

2. The brief facts of the case are that on 16.1.1982, on the date of occurrence, at 11:00 A.M., four persons, namely, Aijaj Husain @ Sabu, Raja Miyan, Parvez Akhtar, who are real brother and Goonga @ Noor Ilahi, who is brother-in-law of accused Raja Miyan and is also brother-in-law of the son of the injured, Altaf Husain, came to the house of Altaf Husain. Altaf Husain was sitting on a cot in front of the door of his House. It is the case of the prosecution that while Altaf Husan was sitting on a cot in front of the door of his house, accused, Aijaj Husan @ Sabu gave a cartridge to Goonga and on extortion of Raja Miyan and Parvez Akhtar, accused, Goonga, who was armed with pistol, fired a shot at Altaf Husain, which hit him. The incident said to have been witnessed by Irshad Husain, Zida Husain and Idrish, who also tried to apprehend the culprits, but the accused persons made their escape good. Zafar Husain, son of Altaf Husain, lodged a

First Information Report at Police Sation, which was at a distance of about six kms. from the place of occurrence at 1:45 P.M. on the same day. A case under Section 307 IPC was registered against the accused persons. Altaf Husain was medically examined by PW-4, Dr. Ganga Vishnu, the then Medical Officer Incharge of Primary Health Centre, Pukhrayan on 16.1.1982 at 2:30 P.M. He found following injuries on the person of Altaf Husain.

1- 3 fire arm wounds 0.3 cm. X 0.2 cm. X muscle deep on chin in an area of 2 cm. x 2 cm. Fresh blood, clots present, edges irregular, advised X-ray.

2- Multiple fire arm wounds on chest on both sides, 0.2cm. x 0.2 cm. x probing not done in an area of 21 cm. x 14 cm. advised X-ray.

3- 7 fire arm wounds 0.2 cm. x 0.2 cm. x probing not done on upper part of abdomen on both sides in an area of 14 cm. x 4 cm. advised X-ray.

4-5 fire arm wounds 0.2 cm. x 0.2 cm. x muscle deep on front side of left arm 10 cm. below from tip of shoulder joint-advised X-ray.

3. The doctor was of the opinion that all the injuries were caused by fire arm and were fresh. He referred the injured to District Hospital for x-ray examination. P.W. 7 Dr. H.C. Prasad, Radiologist, U.H.M. Hospital, conducted x-ray examination of the injured on 18.1.1982. The x-ray report is Ex. Ka 5. He found three radio opaque shadows in the region of chin and one in the left arm.

4. The case was investigated by P.W. 8, S.I., R.D. Yadav. After recording the statement of the head moharrir at the police station, he went to Pukhrayan Hospital on 16.1.1982 and from there to village Kaithra. The injured was not available at his home. He recorded the statement of the sister of the injured and searched for the accused. On 28.1.1982 he came to Kanpur and recorded the statement of the informant Zafar Husain and injured Altaf Husain in Fahimabad Colony at Kanpur. On 4.2.1982 he again went to the village concerned and recorded the statements of Irshad Husain, Idris and Fida Husain. He also took the clothes of the injured in his possession and prepared its fard (Ex.Ka 6). He inspected the site and prepared the site-plan (Ex. Ka 7). He recorded the statement of the accused Goonga on 2.2.1982 and accused Sabbu and Raja Mian on 20.2.1982. The statement of Prevez was recorded by him on 17.1.1982. After completing the investigation, he submitted the charge-sheet (Ex. Ka 3).

5. The accused denied the charges and pleaded not guilty. They further pleaded that they have been falsely implicated due to enmity.

6. The Trial court has acquitted Aijaj Husain @ Sabu, Raja Miyan and Parvez Akhtar giving benefit of doubt, but convicted Goonga @ Noor Ilahi for three years rigorous imprisonment for committing offence under Section 307.

7. Heard Sri S.A.N Shah, learned counsel appearing on behalf of the appellant and Sri G.H. Bisaria as well as Sri A.K. Verma, learned Additional Government Advocates in opposition.

8. Learned counsel for the appellant submitted that in the First Information Report four persons, including the appellant, were named and identified. Out of four accused persons, benefit of doubt was given to three accused, namely, Aijaj Husain @ Sabu, Raja Miyan and Parvez Akhtar, therefore, on the same ground, benefit of doubt should be given to the appellant, Goonga, also. He further submitted that since thirty years have passed, the accused may be released on probation and further the punishment awarded may be converted into fine.

9. Learned Additional Government Advocate submitted that the incident occurred on 16th January, 1982 at 11:00 A.M. at Village Kaithra infront of the house of Altaf Husain. The four accused persons, named in the First Information Report, came to the house of Altaf Husain when he was sitting on a cot infront of his door. The specific case of the prosecution right from the F.I.R. is that Aijaj @ Sabu gave a cartridge to Goonga, while Raja Mian and Parvez Akhtar exhorted and the appellant-Goonga fired shot at Altaf Husan, who sustained bullet injuries on his chest and shoulder. A First Information Report was also lodged on the same day at 1:45 P.M. against the aforesaid four accused persons and they were named in the First Information Report. Altaf Husain was medically examined and in the medical examination bullet injuries were found which establishes that Altaf Husain was fired by the fire arm. In the circumstances, the Trial court has rightly convicted the appellant. He further submitted that on the facts and circumstances of the case, acquittal of Aijaj Husain @ Sabu, Raja Miyan and Parvez Akhtar on the ground of benefit of doubt is not justified. However, since the matter is quite old, it would not be appropriate to reopen the case at this stage against them.

10. I have considered rival submissions and perused the evidences on record.

11. The incident took place on 16th January, 1982 at 11:00 A.M. in front of house of Altaf Husain in Village Kaithra. The evidence on record establishes that Altaf Husain was shot by fire arm and the report of PW-4, Dr. Ganga Vishnu, the then Medical Officer Incharge, clearly established that the injuries were caused by fire arm and were fresh. The injuries were on chest and on the upper part of the Abdomen apart from other injuries, which were fatal in nature. The First Information Report was lodged at 1:45 P.M. on the same day. It is true that in the First Information Report, the name of any independent witness or immediate neighbour of the injuried was not given, but the incident took place in a broad day light, therefore, the statement of the injured cannot be disbelieved. The accused and the injured appears to be relatives. The Trial court has given benefit of doubt to three accused on the ground that those three accused, namely, Aijaj Husain @ Sabu, Raja Miyan and Parvez Akhtar were real brothers and they had enmity with the injured and for that reason their names might have been included in the First Information Report. However, the fact remains that when all the four accused persons have been identified to be involved in the incident and named in the First Information Report, the view of the Trial court in giving benefit of doubt to three accused does not appear to be reasonable, but since the matter is quite old, it would not

be appropriate to reopen the case against three accused persons, who have been acquitted, but on the basis of the evidences on record, there is no doubt that the fire was shot by the appellant Goonga @ Noor Ilahi, which caused serious injuries, fatal in nature and may result into the death of the injured, Altaf Husain, therefore, the appellant has rightly been convicted under Section 307 of the IPC by the Trial court.

12. For the aforesaid reasons, I do not find any reason to release the appellant on probation and having regard to the nature of the injuries, it is not a fit case for conversion of the case from Section 307 IPC into 324 IPC and to impose fine. Justice demands that the crime should not go unpunished.

13. In the result, the Appeal fails and is dismissed. The order dated 14.7.1982 passed by the Sessions Judge (Non Metropolitan Area) Kanpur convicting and sentencing the appellant, as aforesaid, is affirmed. The appellant is on bail. C.J.M., Kanpur Dehat is directed to take the appellant into custody and send him to jail for serving out the sentence awarded by the trial court and affirmed by this Court.

14. Office is directed to communicate this order to the C.J.M. concerned for compliance within a period of one week

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**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 17.10.2012**

**BEFORE**
**THE HON'BLE RAKESH TIWARI, J.**
**THE HON'BLE ANIL KUMAR SHARMA, J.**

Criminal Appeal No. 3881 OF 2005
*Connected with*
Criminal Appeal No. 4165 of 2005

**Mani Raj Singh Rathore son of Rishi Singh Rathore resident of village B-2/36, Tourist Restaurant, P.s. Bhelupur, District Varanasi. ...Applicant**
**Versus**
**The State of U.P. ...Respondents**

**Counsel for the Petitioner:**
Sri Ashok Mehta
Sri Brijesh Sahai
Sri Shiv Kumar Pal

**Counsel for the Respondents:**
Sri R.A. Mishra
A.G.A.

**Crimianl Appeal-against punishment of life imprisonment-punishable under section 376 (2) (g)-on ground of in ordinate delay in lodging F.I.R.-victim a German Lady-stayed in hotel-two accused persons offers "Lussi" with intoxicated substance and ravished her on the roof of the hotel-prosecution story fully supported by statement of victim-after getting rid from their clutches-with help of another foreign lad-as escaped herself by shifting another hotel-hence can not be termed in ordinate delay-punishment-held-proper-requires no interference .**

**Held: Para- 31 and 40**

**In the facts and circumstances of the case we are of the considered opinion that the trial court has rightly held that being a foreign lady without any companion the victim was under**

**dilemma and confused about her future course of action. She on pondering over the matter after shifting from Tourist Rest House to Hotel Ajay on 5.7.2001 decided to lodge the FIR as such there is no unreasonable delay in reporting the crime to the police.**

**It also appears that there was another foreign lady also staying in the rest house, who met the victim in the morning. She on coming to know about the incident of the previous night from the victim helped her in shifting to hotel Ajay, where she also shifted along with her. There is nothing unnatural in the behaviour of the victim in confiding in another woman about being raped by the accused persons when she asked about the commotion in the night and in discussing the pros & cons with her regarding future course of action. The victim was in a foreign country and there was none on whom she could have placed reliance. She deliberate the matter during the day and ultimately decided to lodge the FIR against the accused persons after she could gather a courage on 5.7.2001. Thus we find that there is no inordinate delay in the lodging the report of the crime with the police. The incident took place on 3.7.2001.**

**Case Law discussed:**

AIR 1996 SC 1393; AIR 2003 SC 4684

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. We have heard Sri Ashok Mehta, learned counsel assisted by Sri Brijesh Sahai for the appellant, Sri R.A. Mishra, learned AGA for the State and perused the record.

2. The appellants in these two connected appeals have challenged the judgment and order dated 30.8.2005 passed by the Additional District Sessions Judge/Special Judge (E.C.Act) in S.T. No.65 of 2002 (State Vs. Mani Raj Singh and another) whereby, both the appellants have been convicted for the offence punishable under section 376 (2) (g) IPC and sentenced each of them to undergo imprisonment for life and fine of Rs.1 lac each with default stipulation.

3. The prosecution story in a nut shell is that a German lady (hereinafter referred to as the 'victim') was a visting tourist. A written report was submitted by her to the Officer-in-charge, Police Station Bhelupur, district Varanasi on 5.7.2001 at 8.20 p.m. alleging that she had come to India in the mid of March 2001. She had reached Varanasi via Agra on 3.7.2001 and stayed there in Room No.203 at the Tourist Rest House, Tulsighat; that the accused persons were making advances at her, since the time she had checked in the rest house. In the night of 3.7.2001 at about 11.00 p.m. she was offered LASSI by Mani Raj Singh, the owner of the tourist house and Vinod Kumar Singh, a tourist Guide. After drinking LASSI she became drowsy and she was taken to the roof of the Rest House by the aforesaid two persons where they forced themselves upon her to satisfy their lust. Thereafter, she was somehow able to go to her room and closed the door. The accused persons knocked at the door again and again asking her to repeat the carnal act but she did not open the door of her room. Yesterday also they made effort to have sex with her, but any how she could save herself. As soon as she got a chance in the next morning she left the rest house and shifted to Ajay Hotel situated at Lahuraveer, Varanasi.

4. On the basis of the written report dated 5.7.2001, check report was prepared and Case Crime No.90 of 2001 was registered in the G.D. under section 376 IPC, against the aforesaid two accused

persons at Police Station Bhelupur (opposite Assi Ghat), Varanasi. The investigation was conducted by S.I. B.N. Tiwari. He interrogated the complainant, prepared the site plan and seized the register of the Tourist Rest House vide memo (Ex.Ka-9) in presence of public witnesses, wherein the victim had given details of herself as well as the time of arrival and departure from the rest house.

5. Medical examination of the victim was conducted by Dr. Mridula Mullick on 6.7.2001 in Women's Hospital, Varanasi. In her medical report she recorded that the victim was about 5 feet 5 Inch tall, weighed about 61 kgs. and had an average body built. Her secondary sexual character were well developed. No mark of injury was found on any part of her body. On internal Examination, no mark of injury was seen on her private parts. Hymen was old torn. Her vagina admitted 2 fingers easily and she was menstruating. Vaginal smear was taken which was sent for Patholoigcal examination of detection of spermatozoa. Since the victim had a change of clothes and undergarments, she was wearing at the time of incident, therefore, they could not be sealed after medical examination. Radiological examination of X-ray of right wrist joint, left knee joint and right elbow joint was advised for estimation of her age. In the supplementary report prepared on the basis of Pathological Report, vaginal smear was found negative for presence of spermatozoa but contaminated with blood. On the basis of Radiologist report the age of the victim was ascertained to be above 18 years.No definite opinion regarding rape could be given by the medical officer.

6. The victim's statement u/s 164 CrPC was recorded by the Additional Chief Judicial Magistrate-V, Varanasi on 6.7.2001, which reads as as under :

*"I belong to German country. I came to India in 15th March 2001. Firstly, I went to Bombay, Banglore, Kerala, Agra then came to Varanasi on 3rd July 2001 and stayed at Tourist Guest House-Tulsi Ghat in Room No.203.*

*In the night of 3rd July at 11.00 p.m. onwer of Hotel Mani Raj Singh gave me Lassi with some intoxicant. I became confused and my heart fastely began to beat. I could not move, Mani Raj Singh kissed me and touched my body and breast.*

*Mani Raj Singh and Vinod Singh badly both raped with me on the top of roof one by one. They put off my whole clothes and naked me and both (sic) tried again and again sexual intercouse with me but any how I escaped. When I locked my room, they knocked my room again and again and tried for sexual intercourse. When I got chance, I left rest house and went to police station for information. I shifted to Hotel Ajay, Lahurabir.*

*Satement heard and verified.*
*Sd/- illegible*
*6.7.2001."*

7. The investigation culminated in chargesheet against both the accused-appellants. After committal of the case to the Court of Session, the charge against the accused under Section 376 (2) (g) IPC was framed by the Additional Sessions Judge, Varanasi. The accused denied the charges and claimed trial.

8. The prosecution produced nine witnesses in support of its case namely, PW1 Dr. Mridula Mullick, PW 2 Devi

Prasad Singh, PW 3 Umashankar Gangele, PW 4 I.B. Yadav, PW 5 Mohd. Ali, PW 6 Sanjay Sahai, PW 7 V.N.Tiwari, PW 8 S.D. Pandey and PW 9 the victim. Accused Mani Raj Singh and Vinod Kumar Singh were examined under section 313 Cr.P.C. They also produced five defence witnesses in support of their case namely, DW 1 Sri Atam Banerji, DW 2 Virendra Babu Singh, DW 3 Uma Shanker Gangele, DW 4 B.N. Tiwari and DW 5 Sri Mritunjai Singh.

9. On appreciation of oral and documentary evidence on record and hearing arguments of the counsel for the parties, the trial court vide its order dated 30.8.2005 held both accused Mani Raj Singh and Vinod Kumar Singh guilty of the offence under section 376(2)(g) IPC convicting and sentencing them for life imprisonment and fine as stated earlier.

10. Counsel for the appellants challenges the impugned judgment and order on the ground that the order of conviction is bad in law, as it is against the weight of evidence and the sentence is too severe. The appellants have not committed any offence, as alleged by the prosecution. The appellants Mani Raj Singh and Vinod Kumar Singh did not know each other as the later had never come to his rest house or met him ever prior to the said incident; that the appellants were not known to each other they had no motive to commit the crime together as alleged against them.

11. It is argued that Vinod Kumar Singh can not also be said to have been involved in the incident at all as he is said to have gone on the roof for 5-10 minutes. P.W. 6, Sanjay Sahai in his statement had specifically stated that the said accused had thereafter come back and hence could not have had any opportunity to violate the honour of the victim even if the case of the prosecution is taken on its face value. It is argued that the incident had not taken place in the manner as stated by the prosecution; that the accused were falsely implicated in the case by the management of Hotel Ajay because of business rivalry with Mani Raj Singh Rathore and their strained relations with Vinod Kumar Singh and that the victim had allowed herself to be taken advantage of the rival management against the two accused persons for the reasons best known to her. It is stated that the Investigating Officer had also not disclosed in his statement as to what was the intoxicating substance mixed in the Lassi alleged to have been given by the accused to the victim and therefore, there was no charge framed against the accused persons under section 328 IPC .

12. Learned counsel for the appellants submits that the victim claimed herself to be in a state of drowsiness allegedly on account of intoxicated LASSI offered to her to drink by the accused persons, therefore, she could not have identified any person who might have committed rape upon her much less the accused persons, who were innocent; that the statement of the prosecutrix recorded under Sections 161 and 164 Cr.P.C. can-not be relied being contrary to and against the record. These statements are therefore, not admissible; that FIR has been lodged after inordinate delay to implicate them by management of Hotel Ajay and the prosecution has failed to bring home the guilt of the accused persons beyond reasonable doubt.

13. He further emphasized that Atam Banerji was a German English Translator, who had been summoned by the Court on the request of the victim to help her during the cross-examination as she was unable to

understand the questions put to her even though she had not submitted any application for providing the services of German-English Translator as such the trial Court had committed an error in law in providing aid of such a translator without any application moved by the victim.

14. The counsel for the appellants finally concludes that defence was not given proper opportunity to rebut the statement of the victim; that the case of the prosecution does not fall under section 375 of Explanation "fifthly" of I.P.C; that the FIR stands demolished in so far as the factum of alleged rape by the accused on the victim is concerned i.e., except going on the roof part which is no offence particularly in context of this fact that there is no supporting material regarding committing of rape by the accused with the victim and as such the appellants are liable to be acquitted or a lenient view in quantum of sentence may be taken by the court as the appellants have languished in jail from 10.7.2001 to 24.3.2001 and thereafter since 3.8.2005 after their conviction in the case i.e. for more than ten years for a crime they have not committed.

15. Learned AGA submits that offence committed by the accused under Section 376 (2) (g) IPC is fully proved beyond doubt on the basis of evidence on record as well as circumstantial evidence. That the appellants had known each other from before and had committed rape on the victim in the manner stated by the prosecution by forcing her to sexual intercourse under intoxication and without her consent.

16. The AGA has then placed the statements of both the accused under section 313 Cr.P.C. to establish that the two accused had known each other as they had worked in the group of Hotels run by Hotel Ajay whereas Mani Raj Singh worked in Hotel Buddha (a family hotel of Hotel Ajay) up to the year 2001, Vinod Singh had also worked in Hotel Ajay at Lahurabir, Varanasi during the same period i.e. 2000-2001 and left thereafter. After which Mani Raj Singh started his own rest house. The relevant portion of deposition of Mani Raj Singh is as under:-

''मैं टूरिस्ट रेस्ट हाउस तुलसीघाट का वाराणसी का मालिक व संचालक हूँ। **मैने यह रेस्ट हाउस सन् 2000 ई. में लाइसेंस लेने के उपरांत प्रारम्भ किया। इसके पूर्व में अजय होटल के फैमिली होटल होटल बुद्धा में कार्य करता था** और अपना रेस्ट हाउस प्रारम्भ करने के बाद मैने होटल बुद्धा में काम छोड़ दिया। होटल अजय के पांच होटल हैं। होटल अजय, होटल गौतम, होटल पुष्पांजली, होटल बुद्धा एवं होटल सूर्या। दौरान कार्य टूरिस्ट रेस्ट आउस में मैं बहुत कम्पटीटिव रेट पर काम कर रहा था, जिससे हमारे पूर्व मालिक के यहां पैसेंजर (ग्राहक) नही जा रहे थे। जिससे उनको आर्थिक क्षति हो रही थी।'

17. The statement of accused Vinod Singh given u/s 313 CrPC shows that he had also worked in Hotel Ajay. Therefore, the accused had known each other for long time. The relevant portion of the statement of accused Vinod Singh is as under:

''दिनांक 23.7.2000 तक उत्तर रेलवे वाराणसी में श्री यू. पी. सिह पूड़ी ठेला, वाराणसी के यहां हेल्पर का काम करता था। मेडिकल का छाया प्रति द्वारा सीनियर डिवीजन मेडिकल आफीसर द. रे. की छाया प्रति साथ में संलग्न है और जब प्रार्थी के मेडिकल का नवीनीकरण नही हुआ तो **प्रार्थी ने अजय होटल लहुरावीर, वाराणासी के यहां कुक का काम अगस्त 2000 में मु0 4,000/रू0 प्रतिमाह के दर से कार्य करने लगा और 10 जनवरी 2001 को जब अजय होटल के मालिकान ने प्रार्थी की मु0 7,000/बकाया नही दिया तो प्रार्थी ने काम छोड़ दिया।** 30.6.2001 को मैंने अजय होटल के मालिकान से सख्त तकादा किया और अदालत में जाने की बात कही। जिसकी वजह से अजय होटल वाले ने मुझे समझ लेने की धमकी दिया था और उपरोक्त झूठ मुकदमें में बदले

की भावना से मुल्जिम बनवा दिया। मैंने कभी गाइड का काम नही किया। मैं ठीक से हिन्दी भी नही जानता। अंग्रेजी तो मै बिल्कुल नही जानता। मैंने टूरिस्ट रेस्ट हाउस तुलसीघाट देखा ही नही है और न ही कभी वहां काम किया है।"

18. To further substantiate that accused-appellants not only knew each other but were intimate and accused Vinod Kumar Singh was familiar with the outlay of the rest house and was known to their employees. The learned AGA has placed the statement of PW 6 Sanjay Sahai and submitted that this witness has stated that Vinod Kumar Singh had come at about 11.00 p.m. and had enquired from him about Mani Raj Singh. On being informed by him that Mani Raj Singh was on the roof with a lady. Vinod Kumar Singh also went there. He came back and asked for something to eat and drink to be served to the lady guest (victim). P.W.6 told him that there is curd in the fridge which was taken out and Lassi was prepared by Vinod Kumar Singh which he took upstairs on the roof in a glass and returned again within 5-10 minutes. This witness also stated that when Mani Raj Singh was with the victim on the roof of the rest house since 8.30-9 p.m. he had called him for getting candles to prepare romantic atmosphere on the roof which were brought by him. In his cross-examination P.W.6, Sanjay Sahai stated that when Mani Raj Singh and Vinod Kumar Singh were on the roof, he was again beckoned for getting some cigarettes which he purchased from the market and gave it to them. This witness, however, in his cross-examination denied his statement u/s 161 CrPC, although he has admitted therein that when Mani Raj Singh accused and the victim were on the roof the former specifically directed him that if any one asks for his whereabouts he may be informed that he is not there and to come on the roof only when he was called by him.

19. On the basis of the aforesaid statements of the accused persons, the learned AGA would argue that these statements belie the contention of the learned counsel for the accused-appellants that they were unknown to each other. Had Vinod Kumar Singh been unknown to Mani Raj Singh, he would not have behaved in the manner as has come in the testimony of P.W. 6 i.e. he asked about Mani Raj Singh from Sanjay Sahai, P.W.6 and went to the roof straight away where Mani Raj Singh was with the victim came down and prepared LASSI by taking curd from the refrigerator and again went on the roof top of the rest house to serve the same to the victim.

20. As regards delay in lodging the FIR is concerned, learned AGA has submitted that the victim was raped by the accused persons on the roof of the rest house. She was put under the influence of some intoxicants given to her in the LASSI offered by the accused-appellants. She was not able to move from the rest house until next morning as she was put under intoxication by the accused in the rest house. They after committing rape upon her had again come to her room and knocked on her door to get it opened for violating her again. When with the aid of another lady of foreign origin she could shift to hotel Ajay. She could not have in the circumstances known the management of this Hotel or the fact that there was any rift or business rivalry between the management and the accused Mani Raj Singh, owner of the rest house prior to shifting. She had confided only in the foreign lady who also had shifted with her from the rest house. Therefore, there could also be no motive or

occasion for her to confide about the incident with the management of Hotel Ajay or know about any business rivalry between them and that the victim was not in a normal state of mind and was able to leave the rest house with the help of another foreigner lady who after hearing her miseries not only had helped her in moving out in the morning of next day to Ajay Hotel but had herself also moved there.

21. He further submits that there is nothing wrong if the victim took some time to calm herself and sort out the situation in which she was finding herself gang raped by two persons in a foreign country as she was an unmarried young woman. It had clearly come out in her statement that after thinking over the matter for a long time, she gathered enough courage at about 8.00 P.M. when she decided to inform the police and FIR was thereafter lodged by her at about 8.20 p.m 5.7.2001 at P.S. Bhelupur, Sadar Varanasi.

22. It is vehemently argued that this is a case where a lady had come to our country as a tourist and had been raped by the owner of the tourist house and the guide together. It is stated that defence of the accused that they have been falsely implicated is evident by fact that FIR was lodged after considerable delay after the prosecutrix had shifted to Hotel Ajay is not sustainable. According to him, no tourist much less a foreigner would involve her honour in a foreign country only for the purpose of implicating anyone for an alleged business rivalry between two sets of hotels, particularly whom she did not even know from before as she has come to Varanasi for the first time.

23. After hearing counsel for the parties and on perusal of record we find that prosecution has been able to prove the guilt of the accused beyond all reasonable doubt for reasons given in subsequent paragraphs hereinaftter.

24. The victim in her statement has narrated the effect of intoxicated Lassi offered by the accused persons, the act of ravishing her by them on the roof and the developments thereafter resulting in lodging of the FIR by name against the accused persons which conclusively shows that she had identified and remembered the accused persons even during her drowsiness and the manner in which the accused had followed her up-to her room in the rest house. The relevant extract of the statement of the victim in Court below for ready reference is quoted below.

*".... After drinking Lassi my heart was beating fast. They touched me, kissed me. They put off my clothes. I never* ***consented to their acts.*** *I felt asleep after taking Lassi. They committed sexual intercourse with me. When I got up then I went to my room. I was lying on a bed cover on the roof. When I came to my room, I locked my door. These persons knocked the door and loudly voiced more times. I could not understand the words spoken by them. I did not open the door. The next day a woman asked me what has happened here then she helped me to leave the hotel. Same evening the accused persons brought my clothes from the room and dropped there. After leaving the rest house, I went to some other hotel. The name of that hotel I cannot recall. More people came to and asked about the incident. I went to police station and gave my complaint (Paper No.4A ) is the information which was given by me in the police station. This paper is already exhibited as Ext. Ka-14. This paper has been written and signed by me. After giving this paper police officer*

*asked me about the incident. After giving this complaint, I returned back to my new hotel. The next day, I went to District Hospital and I was medically examined.*

*(Court observation-"The witness while giving her statement was weeping and has tears in her eyes.)"*

25. As drink was mentioned in the statement, the court made a query as to what she understood by 'drink'. In response, she clarified that by drink she meant 'LASSI' which was given to her to drink.

26. In his statement under section 313 Cr.P.C. Mani Raj Singh tried to put the blame on the victim saying that she herself had the intention to have bodily intimacy with him. He stated that--

" दिनांक 3.7.2001 को रात्रि 8.00 बजे मै 5 शहर से आया और अपने रेस्ट हाउस के काउण्टर पर उस दिन आये पैसेंजर का लेखा जोखा देख रहा था कि इसी बीच पीडिता जर्मन नागरिक काउण्टर पर आयी और शिष्टाचार के नाते मैने खड़े होकर उसका अभिनंदन किया और पूंछा कि कोई कष्ट तो नही है कि इतने में पीडिता ने अपना हाथ मिलाने के लिए हमारी तरफ बढ़ा दिया। पीडिता ने मेरा हाथ करीब 5 मिनट तक थामे रखा और मुझे कामुक नजरों से घूरे जा रही थी और कुछ कह रही थी जो मेरी समझ में नही आया। सिफ आगरा शब्द मेरी समझ में आया तथा उसने मुझसे यह भी कहा ''आई लव यू''। उसी रात मै करीब 11 बजे से 12 बजे के बीच पीडिता ने मुझे रेस्ट हाउस के छत पर बुलाया और जब मै छत पर पहुंचा तो वह एक चादर पर लेटी हुई थी और उसने अपना हाथ मेरे तरफ बढ़ाकर उठने में मदद चाही। मैंने उसका हाथ पकड़कर उसको उठने में मदद की, उस समय वह हरे रंग का सिल्की गाउन पहने हुए थी ओर वह बहुत ही रोमांटिक मूड में थी और मुझे बहुत ही कामुक नजरों से देख रही थी। उसने मुझसे ड्रिंक अरेंज करने हेतु कहा जिस पर मैंने कहा कि हमारे यहां ड्रिंक्स सर्व नही की जाती, क्योंकि ड्रिंक्स सर्व करने का लाइसेंस मुझे नही है। तब उसने अपने कमरे की चाभी देकर मुझसे कहा कि हमारे कमरे में व्हिस्की रखी है। उसको लाओ अथवा मंगवाओं। मैंने व्हिस्की व एक गिलास मंगवाया उसने तीन पेग व्हिस्की पिया और नशे की हालत में बार बार ''आई लव यू'' दोहराये जा रही थी। उसके बाद पीडिता ने मुझसे सम्भोग के लिए कहा जो मैंने इंकार कर दिया । मेरे हाथ पकडे हुए थी और मुझे किस करने की कोशिश की, उसने बतलाया कि वह मासिक धर्म में चल रही है। जब मैंने उसकी बात नही मानी, तब वह गुस्से में पैर पटकती हुये बडबडाती हुए अपने कमरे में चली गयी।

27. The above statement of accused Mani Raj Singh speak volumes of his dirty mind. In fact it appears from the above statement of Mani Raj Singh that he was in fact on the roof of the rest house with the victim and had arranged the drink (LASSI) for her. He claims to have refused to have intercourse with her when she had offered herself to him thereafter she in anger went to her room. The manner and sequence of events stated by Mani Raj Singh therefore, tally with the events narrated by the victim in her FIR except that Mani Raj Singh had tried to put the blame on the victim whereas she claimed to have been raped by him.

28. He tries to take shelter behind a Sadhu whom he alleges was in the room of the lady at about 9.00 P.M. on 4.7.2001 who according to his own version moved out from the hotel on his raising objection that the Sadhu could not remain in her room. It is averred that whenever an extra guest stays payment for extra bed is charged or another room is advised to be hired for the guest. The sadhu was a guest of the prosecutrix. She may have been wanting spiritual guidance from the sadhu or was in search of moral values merely because the victim wanted a sadhu to stay in her room would not mean that victim wanted to have any physical relationship with him. On the contrary it can be said that the accused did not want sadhu or any other person with the victim and therefore, did not allow him to stay at the rest house with her on any condition as to convert their 'desire' into

action. He had also denied that the co-accused Vinod Kumar Singh has neither known to him nor had ever he been falsely implicated in the case by Hotel Ajay (family group) due to business rivalry. The relevant extract of the statement of accused Mani Raj Singh is as under:-

"दिनांक 4.7.2001 को 9 बजे रात मुझे मेरे होटल के कर्मचारियों ने बताया कि पीडिता एक बहुत ही हुष्ट–पुष्ट व्यक्ति जो करीब 35 वर्ष का है और रूद्राक्ष की माला व गेरूवा वस्त्र धारण किये हुए है को अपने कमरे में ले गयी है और कमरा भीतर से बन्द कर लिया है। तब मैने जाकर कमरा नंबर 203 का दरवाजा खटकाया तब काफी देर बाद पीडिता कमरे से बाहर आयी। पूंछने पर उसने कहा कि साधू मेरा दोस्त है और रात में मेरे कमरे में रहेगा। मेरे एतराज व काफी समझाने के बीच पीडिता ने उसे बाहर किया। दिनाक 5.7.2001 को वह रेस्ट हाउस छोडकर चली गयी। विनोद कुमार सिंह जो इस मुकदमें में मेरे साथ अभियुक्त है को मैं नही जानता और न ही उन्होंने कभी मेरे रेस्ट हाउस में काम ही किया है। अजय होटल फैमिली ग्रुप ने कारोबार की प्रतिद्वंदिता के कारण साजिशन मुझे इस झूंठे मुकदमें में फंसा दिया।'' (इस कथन में पीडिता के नाम को शब्द पीडिता से संबोधित किया गया है)"

29. What the accused in his statement above wants to say is that the victim was a consenting party in the carnal act. Even if for argument sake a worst case is taken that a woman not known to such pleasure even then she cannot be taken for granted for physical intimacy without her consent.

30. Her feeling and mental condition why she could not lodge FIR immediately after the incident are described in her cross examination where she denied having falsely implicated the accused. The relevant extract of her cross examination reads thus :

*"It is wrong to say that his refusal to have sex with me hurt me and it is also wrong to say that I could not digest the humiliation. It is wrong to say that for two days on 4th of July, 5th of July till evening I could not decide my future action, but the lady inside me was too much hurt. I was fuming with rage against the owner of the rest house. It is also wrong to say that after I shifted to the Ajay hotel, the owner of the hotel Ajay after hearing my story put fuel on the fire and instituted to lodge an FIR. It is also wrong to say that the names of the accused person were provided by the Manager of Ajay Hotel because of business rivalry. It is also wrong to say that the Manager of the Ajay Hotel wrote an FIR and asked me to copy it in my own hand writing. It is also wrong to say that the accused persons never committed sexual intercourse with me.*

*Sometimes I know about Hindu Mythology. I know very little about Muslim Mythology. I know in Hindu Mythologies Cohabitation during Mensuration is strictly prohibited. I wanted that the owner of the Hotel should play the role of boy friend and behave like the boy friend of Agra. I asked some one and came to know that these accused persons were detained in Jail for 3 years. I do not know nor I know that the owner of the rest house is married accused has got three children. It is wrong to say that the accused persons were falsely implicated. It is also wrong to say that the accused persons never violated my person.*

31. In the facts and circumstances of the case we are of the considered opinion that the trial court has rightly held that being a foreign lady without any companion the victim was under dilemma and confused about her future course of action. She on pondering over the matter after shifting from Tourist Rest House to Hotel Ajay on 5.7.2001 decided to lodge the FIR as such there is no unreasonable delay in reporting the crime to the police.

32. She in her statement on 28.4.2005 provided an insight into what was happening in her mind after the incident. Her statement in the trial Court was recorded on 27.4.2005 for three days. She had correctly identified both the accused persons in the Court. The relevant extract of the cross examination read thus :

*"I do not remember that what I was doing in between the time when I reached Ajay Hotel and the time of lodging of FIR in police station Bheloopur at 8.20 p.m. On 5th of July 2001. I have written in my report Ext. Ka-14 that I have stayed in hotel Ajay. My statement was recorded by the Magistrate on 6th of July 2001. In my statement under section 164 CrPC I have stated before the Magistrate that "I left rest house and went to the police station for information. I shifted to Hotel Ajay Lahurabeer." The statement recorded before the Magistrate is true. When yesterday, I came in the court for my statement my heart was beating fastly.*

*On the 3rd of July at 11.00 p.m. in the rest house one people, I can show him ordered Lassi for me. I remember that it was only one glass. I remember the name of the person who ordered for Lassi. He was Mani Raj. Mani Raj is the person who booked the room when I checked in I do not know. I am not sure.*

*I do not exactly remember the day when I was medically examined. I was accompanied by a female police personnel. I have initiated proceeding against.*

*At this stage, the witness has requested that a German English translator should be present at the time of my evidence. On her request further cross-examination is adjourned for tomorrow.*

Sd/- illegible
28.4.2005."

33. In her cross examination on the next day i.e., on 29.4.2005 she not only denied the suggestion that the name of accused Mani Raj Singh was prompted to her by the public prosecutor or police officer sitting in the court. She stated that she was so shocked that she did not see any police station in the way and after checking-in Ajay Hotel she did not talk to the manager of the hotel about the incident. It appears from the above statement that she was thoroughly confused and was suffering from shock of having been forcibly ravished by two accused at the rest house against her will. Then she kept moving without any purpose after reaching Hotel Ajay and lodging the FIR. She did not know what to do in such a situation in a foreign country and upon whom to rely for help. Thereafter she decided to lodge the FIR.

34. Sri Atam Banerji, the German English Translator who had assisted the victim was summoned by the Court as DW 1 to clarify certain question put to the victim and her understanding of it. He stated thus :-

*"He stated that I came to assist the court in connection with the evidence of Miss 'C'. The questions were put by defence counsel to her in English. Every time she was not able to understand the question. I can not say that her English was 50% or 25% correct but she was not good in English. On that day after lunch hours a question was put to the witness- "did you remove your clothes yourself." So far as I remember such type of questions. She was replying herself in English. I do not*

*remember whether she answer to this question was yes or no."*

The aforesaid statement does not bring out any thing against the victim at all, hence does not help the appellants.

35. In so far as his appointment by the Court as Translator for the victim is concerned, there is nothing to suggest that the Court had acted illegally or committed any procedural irregularity in providing the services of a translator on request of a victim of rape who is a lady of foreign origin. The Court below had in the facts and circumstances rightly taken a humanitarian approach in the matter to cut short the technicalities as the victim was unable to understand the import of questions put to her and knew very little English. The victim knew very little English or faulty English is also evident from record i.e. the FIR and on other occasions. She used English as a via media to translate her thought in German into English. However, we have considered the procedure of the Court in calling Atam Banerjee as defence witness in later part of the judgment.

36. The statement of the victim and P.W.6 read with the statements of the accused persons establish the fact beyond doubt that both of them were partners in crime and were well acquainted which is apparent from record. The contention of the learned counsel for the appellants that there was no opportunity or time for Vinod Kumar Singh to have had the victim does not stand to scrutiny. Normally the act of carnal activity does not last for more than three to seven minutes. Therefore, it was possible for Vinod Kumar Singh during the period he was on roof to have raped the victim. Moreover, the accused also had opportunity to satisfy their lust when P.W.6 had been sent to bring cigarettes from the market.

37. It would be apt at this stage to refer to the provisions of Section 375 IPC read with Section 114-A of the Evidence Act. These sections read thus:-

**"S. 375. Rape.**--A man is said to commit 'rape' who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :--

First.-- Against her will

Secondly.-- Without her consent.

Thirdly.-- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.-- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.-- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.-- With or without her consent, when she is under sixteen years of age.

Explanation.--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.--Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

**"114-A. Presumption as to absence of consent in certain prosecution for rape.-** In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to haven raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent."

38. Although it has come in evidence that on account of intoxicating *lassi* taken by the victim at the hands of the accused persons, she became drowsy. The accused persons taking advantage of this have ravished her. The victim had categorically stated in her long deposition before the trial court that she did not consent for the coitus activity and it was done against her will. Therefore, it would be naive to say that the instant case is only covered under exception fifthly. In the instant case exceptions first and second of Section 375 IPC are also attracted. Thus the contention of the learned counsel for the appellants that no charge u/s 328 IPC was framed or proved against the accused persons is without force. Further as per provisions of section 114-A of Evidence Act there would be a presumption that the victim did not consent for sexual intercourse by the accused persons if after proof of intercourse by accused, the victim in her deposition before the Court states that she didn't consent. Since the victim had not given any such consent and therefore, the act of the accused persons would tantamount to sexual assault under Section 376(2)(g) of IPC.

39. The version of the accused persons that the victim had herself under the influence of alcohol/whisky wanted to have intercourse with them is belied. It is apparent from the record that Mani Raj Singh had taken the victim to the roof, he had procured candle light and cigarettes. He had also asked Vinod Kumar Singh, Guide, who had come later on to get something to drink. Vinod Kumar Singh had made query from Sri Sanjay Sahai and was informed that there is curd in the refrigerator. Vinod Kumar Singh had prepared Lassi to the victim to drink and after the same she felt drowsiness. She was only drowsy and not unconscious. Therefore, she had remembered and named the accused-appellants in the FIR as they forced themselves upon her without her consent and had followed her again to her room but she did not open the door for them. The evidence of Sanjay Sahai, P.W.6 and the appending circumstances that accused Mani Raj Singh in order to commit the offence asked him not to let anybody on the roof and if anybody asks him about the whereabouts of Mani Raj Singh he was to feigning ignorance saying that he was not available there and further that he should not come to the roof unless called by Mani Raj Singh is a sure indication that the accused person(s) wanted complete privacy with the victim in order to fulfill their desire of having her any time to satisfy their lust .

40. It also appears that there was another foreign lady also staying in the rest house, who met the victim in the morning. She on coming to know about the incident of the previous night from the victim helped her in shifting to hotel Ajay, where she also shifted along with her. There is nothing

unnatural in the behaviour of the victim in confiding in another woman about being raped by the accused persons when she asked about the commotion in the night and in discussing the pros & cons with her regarding future course of action. The victim was in a foreign country and there was none on whom she could have placed reliance. She deliberate the matter during the day and ultimately decided to lodge the FIR against the accused persons after she could gather a courage on 5.7.2001. Thus we find that there is no inordinate delay in the lodging the report of the crime with the police. The incident took place on 3.7.2001.

41. The most important question in this case is as to whether the prosecution is able to bring home the guilt of the accused on the basis of the evidence was answered in the affirmative. We find that not only this she had named both the accused in her written report and has also mentioned role of each accused in her statement u/s 164 CrPC apart from the fact that the victim had identified the accused also in court beyond doubt during her statement recorded before the trial Court. The court also considered as up to what extent the evidence of the prosecutrix was admissible in this regard considering her statement recorded under section 161 and 164 Cr.P.C. given by her. The evidence given by V.N. Tiwari and the Investigating Officer was also considered.

42. It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust. The prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. In the case of **State of Punjab V. Gurmit Singh Ors. AIR 1996 SC 1393**, the Hon'ble Supreme Court has observed that -

*"the courts must, while evaluating evidence remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her."*

43. On principle the evidence of victim of sexual assault stands on par with evidence of an injured witness just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender. It is on the same principle that evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. Corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases but such evidence cannot be expected in sex offences having regard to the very nature of the offence.

44. To insist for corroboration of the testimony by a victim of such assault amounts to insult to the womanhood. It would therefore be adding insult to injury to insist on corroboration by drawing inspiration from rules devised by the courts in the western world. If the evidence of the victim does not suffer from any basic infirmity and the "probabilities factor" does not render it unworthy of credence as a general rule, there is no reason to insist on corroboration except from the medical evidence where having regard to the circumstances of the case, medical evidence can be expected to be forthcoming subject to this qualification that corroboration can be insisted upon when a woman having

attained majority is found in a compromising position and there is a likelihood of her having leveled such an accusation on account of the instinct of self-preservation or when the probability factor is found to be out of tune.

45. In the case of **Bhupinder Sharma vs State Of Himachal Pradesh AIR 2003 SC 4684**, the Hon'ble Court has observed as under:

*"11. The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery."*

46. The contention of the learned counsel for the appellants that Vinod Kumar Singh was not known to Mani Raj Singh appears to be incorrect. Admittedly, they both had worked in Ajay Hotel. Accused Vinod Kumar Singh was a tourist guide. Therefore, they must have business relation with Mani Raj Singh in the tourist rest house. They were known to each other is also proved from the fact that he had come to rest house and had asked for Mandi Raj Singh, the owner of the rest house. As per statement of PW 6 on being informed that he was on the roof, he straight away went there, came down to prepare something to drink for Mani Raj Singh. He opened the refrigerator and prepare Lassi. These facts show that there was intimacy between the two.

47. The question raised by the counsel for the appellants to the fact that the Sub Inspector B.N.Tiwari did not state in his testimony that what was the intoxicating drug, was put in the Lassi is misplaced. How could the Investigating Officer know about the intoxicating drug administered in the glass of Lassi by the accused because this incident is of the night of 3.7.2001 whereas the investigation had begun in the late evening of 5.7.2001. Only it was the accused persons, who could have known about it.

48. It is also apparent from the statement of the victim that she knew German and little bit of broken English. She was only to understand the question being asked to her and as such had demanded a English-German translator. What were the questions asked and what was translated to her in German for her to understand is not known Sri Atam Banerji, who was doing translation on being record could not say what was the percentage of questions in correct English translated to her. It is unexplained as to what would have been the motive of the victim to implicate the accused persons whether they had any business rivalry in the Ajay Hotel.

49. In defence the accused persons have examined five witnesses as DW 1 to DW 5. Out of them DW 3 and DW 5 were already examined in the case as PW 3 and PW 7 respectively. How a prosecution witness examined in the case can be summoned as a defence witness in the same case? This is beyond our imagination. Before summoning these witnesses, the trial Court ought to have perused the record of the case carefully.

DW 1 is the German-English translator who was summoned by the Court to help the victim during cross-examination on 29.4.2005. DW 2 is the Manager of Hotel India where the victim had stayed from 26.4.2005 to 1.5.2005 when she visited India and Varanasi for making statement in the case. He has been probably examined to say that her stay arrangements etc. were made by the police and they were in constant touch with her till she was examined in the Court. No such suggestions had been given to PW 9 'the victim' in her lengthy and grilling cross-examination which could be completed in 3-days. U.S. Gangele DW 3 is Manager of Ajay Hotel and was summoned along with 'employees attendance register' from June, 2000 to December, 2003. As regards the instant case he has reiterated that the victim had stayed in his hotel from 5.7.2001 (12.30 p.m.). S.I. B. N. Tiwari DW 4 is the investigating officer of the case and Mrituanjay Singh DW 5 is the Asstt. Record Keeper of Police Office, Varanasi and had been summoned along with GD of Bhelupur police station from 5.7.2001 to 30.7.2001. Out of these five defence witnesses, DW 2 and DW 4 have been declared hostile by the defence. The trial Court has committed procedural illegality in the case by summoning the prosecution witnesses as defence witnesses. If at all in the interest of justice any clarification was required from any prosecution witness they could be summoned with the leave of the Court on being cross-examined on specific questions, which could not be or were not put to them when their deposition was recorded in the Court. However, the irregularity committed by the trial Court does not in any manner affect the merits of the case. The net result of statements of DW 1 to DW 5 that the defence could not create any dent in the prosecution story, which has been found trustworthy and reliable.

50. The argument of the learned counsel for the appellants that accused Mani Raj Singh had been in jail from 10.7.2001 to 24.3.2004 and thereafter since 3.8.2005 after their conviction in the case, hence a lenient view in quantum of sentence may be taken by the Court but find this plea unacceptable to our conscience. This is not a common case of rape with a woman by any accused, which are on a rise in our society. It is a case which has tarnished the image of the country as a whole in the international society. The henious crime had been committed in the holy city of Varanasi which is an ancient pilgrimage not only for Hindus but to Muslims, Buddhists etc. and the accused are the persons who are engaged in tourism industry. Every visitor may be Indian or foreigner on stepping over the land of Mahadeo come in contact with these people with trust and faith and if they commit breach of trust by self involving in crime like the instant one, then no woman would be safe who had come with a hope to have peace and salvation to visit 'Kashi' situated on the bank of Holy Ganga. The instant crime is slap on our age old culture, which talk of " अतिथि देवो भवः" i. e. 'Guest become God' and Manu had gone far further where he said " यत्र नारी अस्तु पूज्यन्तें, रमन्ते तत्र देवता।।" - i. e. "Gods reside in the places where woman is worshiped." Rape or Gang rape with a lady should not be taken leniently much less than a case of foreigner in the holy place like Varanasi which is a scar on our Tourism Industry as well. Foreign ladies are to be respected like our Indian woman and a rape with a foreigner lady

like the victim who had come along to visit various places in our country should entail exemplary sentence not only because the foreigners, but because such Indians tarnishes the lady of our country and Indian Culture. If such an act is left to go punished lightly then not only our international relations would be deteriorated but being an Indian, we feel a little in our own eyes.

51. In view of the above discussion we are of the considered view, that the prosecution has successfully proved its case beyond all reasonable doubt against both the accused and the learned trial Court has rightly found the accused Mani Raj Singh and Vinod Kumar Singh guilty for the offence under section 376 (2) (g) IPC. Further we are not inclined to reduce the sentence awarded to the appellants by the Court below for reasons mentioned above. We find no merit in both the appeals which are accordingly dismissed. Both the appellants are in jail and would serve out the remaining part of their sentence. The trial Court has awarded compensation of Rs. 1.5 lacs to be paid to the victim out of the amount of fine realized from the appellants. Since the victim is a German national, so we direct that after realization of fine the trial Court would remit the amount of compensation to the victim after getting her residence/postal address verified from German Embassy in India so that she may not have to visit India after incurring huge expenses.

Let a certified copy of the Judgment be sent to the Court concerned for compliance, which should be reported within a month.

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**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 07.11.2012**

**BEFORE**
**THE HON'BLE VISHNU CHANDRA GUPTA, J.**

U/S 482/378/407 No. - 4823 of 2012

**Mansha Ram and Ors. ...Petitioner**
**Versus**
**The State of U.P and Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri J.P. Yadav

**Counsel for the Respondents:**
Govt. Advocate

**Code of Criminal Procedure-Section 2 (d) 190 (a) offence under Section 323, 504 I.P.C.-procedure for taking cognizance by the Magistrate-where charge sheet submitted by Police-disclosed non-cognizance offence-whether such order be treated to be passed under Section 190 (b)-whether such Police Officer's statement required under Section 200 Cr.P.C.-question referred to Larger Bench**

**Held: Para-14**

**It is evident that in both the above mentioned Judgments of this Court in Dhanveer's case (Supra) and in Mahatab's case (Supra), wherein judgments were delivered by Single Judge of this Court, cited by the learned counsel for the petitioners the impact of section 190, 200,204 and section 461 has not been considered while setting a side the order of taking cognizance. As this Court differs with the opinion expressed in aforesaid two judgments by Single Judge of this Court, therefore, the record of this case be placed before Chief justice of this court with a request to form a larger bench to decide the controversy in question on the following formulated questions:-**

**1. What procedure ought to have been adopted by the Magistrate before taking cognizance of offence and issuing process against the accused on a report made by the police officer in a case which discloses, after investigation, the commission of a non-cognizable offence ?**

**2. Whether the Magistrate could pass an order issuing process against the accused persons on a report made by the police officer in a case which discloses, after investigation, the commission of a non-cognizable offence without examination of police officer and the witnesses keeping in view of the provisio added to section 200 of Cr.P.C. without mentioning in the order specifying section 190(a) of Cr.P.C.?**

**3. Whether the order passed by the Magistrate issuing process on a report made by the police officer in a case which discloses, after investigation, the commission of a non-cognizable offence without specifying the details as mentioned in question No.2, shall deemed to have been passes under Section 190(b) ?**

**Case Law discussed:**
2010 (71) ACC 388; Application Under Section 482 No.32940 of 2010 Mahtab and others Vs. State of U.P. And another

(Delivered by Hon'ble Vishnu Chandra Gupta, J.)

1. Heard learned counsel for the petitioners and learned AGA.

2. By means of this petition under section 482 of Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') the petitioners have challenged the charge sheet (Annexure-2) filed by police under Sections 323, 504 IPC against them and order of taking cognizance there on vide order dated 3.7.2010(Annexure-3).

3. The factual matrix in short for deciding this petition is that initially under orders of the Magistrate passed under Section 156(3) a first information report was lodged at Case Crime No.218A of 2010, under Sections 147, 323, 504, 394, 307 IPC in Police Station Taroon, District Faizabad. The matter was investigated by the police and after investigation it was found that offences only under Sections 323, 504 IPC are made out and submitted the charge-sheet on 12.05.2010 against the petitioners whereupon the court took cognizance and proceeded against the accused by issuing summons vide impugned order dated 03.07.2010.

4. It has been submitted by learned counsel for the petitioners on the strength of judgments of this Court delivered in ***Dhanveer and Ors Vs. State of U.P. and another*** reported in ***2010 (71) ACC 388*** and judgment delivered in ***Application Under Section 482 No.32940 of 2010 Mahtab and others Vs. State of U.P. And another*** on 1.10.2012 contended that in view of the provision contained in in Section 2(d) of Cr.P.C. if police officer submits a report under Section 173 in respect of a non-cognizable offence the procedure prescribed for conducting the trial of such cases would be of complaint case. On this score and on the strength of cited judgments the cognizance has been assailed on the ground that the same cannot be treated to be taken on complaint under section 190 (a) and would be treated to be taken under section under Section 190(b) of the Cr.P.C..

5. There could not be any divergence with the proposition of law as held in aforesaid cases cited by the learned counsel for the petitioners. It is not disputed that police submitted a chargesheet in non-cognizable offence after investigation,

therefore the chargesheet submitted in this case shall be treated as complaint as defined in explanation of section 2(d) of Cr.P.C. which is reproduced herein below

*"2(d). "complaint" means any allegation .....*

*Explanation.-- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;*

6. Therefore the Magistrate is bound to follow the procedure of a complaint case for the trial of the accused.

7. Procedure for complaints to Magistrate is given in Chapter XV of Cr.P.C. This provides the procedure for taking cognizance on a complaint, which contains in Sections 200 to 203 Cr.P.C. Section 200 of Cr.P.C. is reproduced here-in-below:-

*"200. Examination of Complainant.-- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present , if any, and the substance of such examination shall be reduced in writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:*

*Provided that, when the complaint is made in writing , the Magistrate need not examine the complainant and the witnesses--*

*(a) if the public servant acting or purporting to act in discharge of his official duties or the Court has made the complaint; or*

*(b) if the Magistrate makes over the case to another Magistrate under section 192:*

*Provided further that if the Magistrate makes over case to another Magistrate under section 192 after examining of complainant and witnesses, the latter Magistrate need not re-examine them."*

8. First proviso added to Section 200 provides a procedure where a complaint made in writing by a public servant acting or purporting to act in discharge of his official duties the Magistrate need not examine the complainant and witnesses. The court can proceed on the basis of complaint and material annexed with the complaint in writing. The Magistrate may either proceed under Section 203 Cr.P.C. if he satisfies that no sufficient material is available to proceed against the accused.But where the Magistrate is of the opinion that there is sufficient material to proceed against the accused he will issue process to the accused in pursuance of Section 204 Cr.P.C.

9. Section 204 Cr.P.C. is in the chapter XVI of the Cr.P.C which have heading **"COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATE".** Thus Section 204 Cr.P.C. is not only meant for taking cognizance by issuing process upon complaint under section 190(a) of Cr.P.C. but this section also apply for taking cognizance on police reports under section 190(b) and in other contingencies as mentioned in section 190(c). This is evident from the provision of sub section 3 of section 204 and heading of Chapter XVI of

Cr.P.C. No prescribed form or format is available in the Cr.P.C. for taking cognizance of offence and issue of process against accused. The Magistrate took cognizance after considering the material available on record and if the Magistrate is satisfied that the material available on record is sufficient to proceed against the accused he by passing the order for summoning the accused to face the trial either by way of summon or by warrant as the case may be for the attendance of accused to face the trial.

10. Admittedly, no procedure is prescribed in Cr.P.C., in what manner the Magistrate has to pass an order in all three contingencies. Therefore,the Magistrate may adopt the procedure similar to all three contingencies contained in Section 190 of Cr.P.C.

11. From perusal of the impugned order of taking cognizance of offence and issuing process, it is clear that Magistrate after satisfying with the material on record issue process to the accused person. True, that the Magistrate has not mentioned in his order that he is taking cognizance under Section 190(1)(a) or (b) or ( c) of Cr.P.C. but for this simple reason it could not be assumed that the Magistrate took cognizance under Section 190 (b) and not under section 190(a).

12. As stated earlier that pre-cognizance stage had already been over and cognizance has taken. So far the pre-cognizance stage is concerned, in case of written complaint made by a government servant his examination and examination of witnesses under Section 200 Cr.P.C. is not at all required. Admittedly, in this case in view of Section 2(d) of the Cr.P.C. the police inspector submitted the charge-sheet under Section 323, 504 IPC before Magistrate so in view of the first proviso of Section 200 Cr.P.C, the Magistrate need not go back to pre-cognizance stage and the Magistrate would be competent enough to pass an order taking cognizance of offence and to issue process against the accused. However, after taking cognizance and issue of process against the accused it would be incumbent upon the Magistrate to adopt the procedure meant for trial of accused in a complaint case.

13. In view of the aforesaid facts and circumstances the cognizance taken by the Magistrate shall deemed to have been taken under section 190(a) and not under section 190(b) of Cr.P.C. Thus, in the opinion of this Court the impugned order of the Magistrate neither have any illegality nor suffer from any jurisdictional error. Of course, it would be better if Magistrate clarifies it in the impugned order by describing it that cognizance is taken in the light of provisions contained in explanation of section Section 2(d) or taken under section 190(a) of Cr. P.C. But Only due to absence of it would not vitiate the order of taking cognizance specially when no prejudice shown to have been caused to petitioners. More over this act of the Magistrate does not fall in any of the clause (a) to (q) of Section 461of Cr.P.C.,therefore on this score too , the order of taking cognizance in the case in hand shall not be void and and will not vitiate the proceedings.

14. It is evident that in both the above mentioned Judgments of this Court in Dhanveer's case (Supra) and in Mahatab's case (Supra), wherein judgments were delivered by Single Judge of this Court, cited by the learned counsel for the petitioners the impact of section 190,

200,204 and section 461 has not been considered while setting a side the order of taking cognizance. As this Court differs with the opinion expressed in aforesaid two judgments by Single Judge of this Court, therefore, the record of this case be placed before Chief justice of this court with a request to form a larger bench to decide the controversy in question on the following formulated questions:-

**1. What procedure ought to have been adopted by the Magistrate before taking cognizance of offence and issuing process against the accused on a report made by the police officer in a case which discloses, after investigation, the commission of a non-cognizable offence ?**

**2. Whether the Magistrate could pass an order issuing process against the accused persons on a report made by the police officer in a case which discloses, after investigation, the commission of a non-cognizable offence without examination of police officer and the witnesses keeping in view of the provisio added to section 200 of Cr.P.C. without mentioning in the order specifying section 190(a) of Cr.P.C.?**

**3. Whether the order passed by the Magistrate issuing process on a report made by the police officer in a case which discloses, after investigation, the commission of a non-cognizable offence without specifying the details as mentioned in question No.2, shall deemed to have been passes under Section 190(b) ?**

15. It has been submitted by the learned counsel for the petitioners that in this case the Magistrate has issued the warrant against the petitioners. It is not borne out from the record whether the summon has ever been served upon the accused persons or not. Therefore, no coercive steps shall be taken against the petitioner and further proceedings of Criminal case No. 1497 of 2012, State vs. Mansa Ram and others , under section 323,504I.P.C., P.S. Taroon District Faizabad relating to crime No.219A of 2010 shall remain suspended till further orders of this Court or till receipt of answers of the referred questions by the larger Bench of this Court,which ever is earlier.

16. The office is directed to send the record of this case through Registrar of this court to place the same before Hob'ble Chief Justice for appropriate orders.

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**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 05.11.2012**

**BEFORE**
**THE HON'BLE SAEED-UZ-ZAMAN SIDDIQI, J.**

Bail No. 5146 of 2012

**Rajendra Shukla ...Applicant**
**Versus**
**State Of U.P. ...Respondents**

**Counsel for the Petitioner:**
Sri Pawan Kumar Mishra

**Counsel for the Respondents:**
Govt. Advocate

**Code of Criminal Procedure, Section 439- grant of Bail-applicant is son of license holder-while driving Zeep hit the Indica car of excise inspector-with intention to kill-other co-accused already granted bail-applicant spent more than 5 months in jail-considering law as developed by Apex Court in State of Kerela Vs. Raneef-delay in conclusion of Trial-so many years spent in custody-violation of**

**Article 21 of constitution of India- entitled for Bail.**

**Held: Para-5 and 6**

**This Court is fully conscious that the personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative, according to the particular facts and circumstances of the case.**

**The accused applicant is a public servant, and, as such, there is no likelihood of the accused fleeing from justice and tampering with the prosecution witnesses.Both of them relate to ensure the fair trial of the case.**

**Case Law discussed:**

(2012) 1 SCC 40; AIR 1950 SC 27; (2011) 1 SCC 784

(Delivered by Hon'ble Saeed-Uz-Zaman Siddiqi, J.)

1. Heard learned counsel for the accused applicant as well as learned AGA for the state and perused the FIR and other relevant papers filed in support of the Bail Application.

2. This is the second bail application, first of which was rejected vide order dated 2405.2012. on the ground that the Excise Inspector was travelling in Indica Car, which was hit by the accused applicant with intention to kill. The accused applicant was driving the Jeep and he is the son of licence holder, who is the mother of the accused applicant. This is not only a case of attempt to kill but is a challenge to the authority of the State.

3. The second bail application has been moved on the ground that five months have elapsed and nothing concrete has taken place in the case.There are similar allegations against all the accused persons and the co-accused Adalat Ram Shukla and Ashok Kumar Tiwari have been granted bail by the Learned Sessions Judge, Bahraich vide order dated 07.04.2012. The accused is in jail since 27.03.2012. Reliance was placed upon the judgment passed by the Hon'ble Apex Court in the case of **Sanjay Chandra v. CBI, reported in (2012) 1 SCC 40,** in which the Hon'ble Apex Court has held as under:-

*" In Bihar Fodder Scam [Laloo Prasad case, (2002) 9 SCC 372] this court, taking into consideration the seriousness of the charges alleged and the maximum sentence of imprisonment that could be imposed including the fact that the appellants were in jail for a period of more than six months as on the date of passing of the order, was of the view that the further detention of the appellants as pretrial prisoners would not serve any purpose."*

4. While deciding that case, Hon'ble Apex Court has relied upon the law laid down by it in the case of ***A.K. Gopalan v. State of Madras, reported in AIR 1950 SC 27*** and has held that as under:-

*"The law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt."*

5. This Court is fully conscious that the personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative, according to the particular facts and circumstances of the case.

6. The accused applicant is a public servant, and, as such, there is no likelihood of the accused fleeing from justice and tampering with the prosecution witnesses.Both of them relate to ensure the fair trial of the case.

7. In **State of Kerala v. Raneef (2011) 1 SCC 784,** the Hon'ble Apex Court has held as under:-

*"In deciding bail applications an important factor which should certainly be taken into consideration by the Court is the delay in concluding the trial. Often this takes several years, and if the accused is denied bail but is ultimately acquitted, who will restore so many years of his life spend in custody? Is Article 21 of the Constitution, which is the most basic of all the fundamental rights in our constitution, not violated in such a case? Of course this is not the only factor, but it is certainly one of the important factors in deciding whether to grant bail.In the present case the respondent has already spend 66 days in custody (as stated in Para 2 of his counter-affidavit), and we see no reason why he should be denied bail.A doctor incarcerated for a long period may end up like Dr. Manette in Charles Dicken's novel A Tale of Two Cities, who forgot his profession and even his name in the Bastille."*

8. The law laid down by the Hon'ble Apex Court as stated above is a corner stone relating to fundamental right of liberty vis-a-vis prevention of crime.

9. Considering the facts and circumstances and without expressing any view on the merit of the case, let the accused applicant be released on bail in Case Crime No. 130/2012, Under Section-307/332/353/354/342/323/504/506/427 IPC & 7 Criminal Law Amendment Act, P.S.-Payagpur, District- Bahraich on his furnishing a personal bond and two local and reliable sureties each in the like amount to the satisfaction of the Court/Magistrate concerned.

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**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 12.10.2012**

**BEFORE**
**THE HON'BLE DHARNIDHAR JHA, J.**
**THE HON'BLE RAMESH SINHA, J.**

Habeas Corpus Writ Petition No. - 9245 of 2012

**Kunwar Pal Singh ...Petitioner**
**Versus**
**State of U.P. ...Respondents**

**Counsel for the Petitioner:**
Sri Pradeep Kumar Rai [A.C.]

**Counsel for the Respondents:**
Sri Sudhir Mehrotra
A.G.A.

**Constitution of India, Article 226-Habeas Corpus Petition-Arrest of petitioner-detention in lock up for 14 days-without following the provisions of rule 246 and 251 of U.P.Z.A. & L.R.Act-prior to detention no information given-give undertaking for deposit of loan amount and refusal by petitioner under Rule 246-the action of Tehsildar and collection Amin issuing warrant of arrest-frivolous and unsupportable by law-as the petitioner already released-but wrongful**

**confinement violating personal liberty of petitioner-Rs. 50,000/-awarded towards compensation-with liberty to recoverable from erring Tehsildar and collection Amin.**

**Held: Para-30**

**Thus, we find that the actions of the authorities of the Revenue Department, like, the Tehsildar or the Collecting Amin were completely in infraction of some mandatory Rules and procedures set down by them and, thus, what we find is that not only the issuance of warrant of arrest was frivolous and unsupportable by law but the arrest and confinement of Kunwar Pal Singh into custody was also not supported by the relevant Rules.**

(Delivered by Hon'ble Dharnidhar Jha, J.)

1. We have heard Sri Pradeep Kumar Rai, learned Amicus Curiae on behalf of the petitioner Kunwar Pal Singh, father of Pushpendra Singh, who sent a telegram to the Hon'ble The Chief Justice of this Court at His Lordship's Lucknow address which runs as under:

" मा. मुख्य न्यायाधीश, हाईकोर्ट, लखनऊ।

मेरे पिता कुँवरपाल सिंह को अमीन, तहसीलदार व एस.डी.एम. सदर जिला बदायूँ ने विधि विरूद्ध 5 दिनों दि. 9/2/12 से हवालात में अवैधबंदी बना रखा है, अत्याचार, उत्पीड़न जारी है, कृपया सम्पूर्ण न्याय व मुक्ति दिलायें।

ह0 पुष्पेन्द्र सिंह चौहान
पुष्पेन्द्र सिंह
ग्राम बरायमय खेड़ा, थाना उजियानी
जिला बदायूँ, उ.प्र. "

2. The cognizance of the telegram, treating it as an application seeking relief against an act of encroachment upon the personal liberty of Kunwar Pal Singh, father of Pushpendra Singh was taken by the Court and the matter was directed to be listed before the appropriate Bench, as appears from the order passed by the Hon'ble The Senior Judge, Lucknow Bench on 13.2.2012. The matter was listed before a Bench comprised by two Hon'ble Judges of the Lucknow Bench of the Court and the Bench finding that the territorial jurisdiction was lying within the Allahabad Bench of the Court, directed it to be listed in Allahabad and, accordingly, the proceedings of Habeas Corpus Writ Petition bearing No.9245 of 2012 was drawn up. Notices were issued. By an order dated 2.4.2012 a Bench of this Court recorded that the stand of the State of U.P. that Kunwar Pal Singh had been released from custody on 22.2.2012 be verified by the learned C.J.M., Budaun.

3. We had the occasion of hearing the matter and finding that these appeared prima facie case of violation of some laws to justify the arbitrary and illegal detention of Kunwar Pal Singh directed the learned AGA to file counter affidavit and, accordingly, the counter affidavits along with supplementary counter affidavit was filed.

4. The counter affidavit filed by the State of U.P. on 3.7.2012 contains the statements of facts on the basis of which the State of U.P. has justified the action of arresting Kunwar Pal Singh by the revenue authorities. It has been stated that in fact Kunwar Pal Singh had obtained a loan of Rs. 2,75,000/- from the State Bank of India, Ujhani Branch on 16.10.2003 to purchase a tractor, but he failed to pay back the loan and, accordingly, a recovery certificate under Section 11-A of the U.P. Agricultural Credit Act, 1973 was issued and on that basis the Tehsildar, Budaun with the endorsement of District Magistrate, Budaun proceeded in accordance with law.

5. It was stated that as per Rule 236 of U.P. Zamindari Abolition and Land Reforms Rules, 1952 (hereinafter referred to as "U.P.Z.A. & L.R. Rules or the Rules'), Writ of Citation in Form No.69 was issued calling upon the said Kunwar Pal Singh to appear before the Tehsildar, Ujhani on 30.5.2011. It appears that the Citation was not personally served upon Kunwar Pal Singh. Servar/Collection Peon, Chandra Pal, reported that the Citation issued in Form No.69 had been hung up at a conspicuous place of the house of Kunwar Pal Singh and a receipt was obtained in token thereof from his son Latesh. A report was submitted by the process serving peon Chandra Pal on 23.5.2011 that Kunwar Pal Singh refused to receive the Citation and, as such, a copy of Form No.69 was affixed at the house of the petitioner and in token of affixing of the Citation, signature of Latesh, s/o Kunwar Pal Singh was obtained.

6. It was stated that the Citation was duly and satisfactorily served as per Rule 246(1) of the U.P.Z.A. & L.R. Rules and, accordingly, a writ of arrest of Kunwar Pal Singh was issued in Form No.70 on 29.8.2011 due to his non-appearance before the authorized officer and it was handed over to the Regional Collection Amin, namely, Vidya Ram Sharma, who reported that Kunwar Pal Singh, having come to know that warrant of arrest had been issued against him, absconded with his movable property, the tractor, and as a result thereof, citation to arrest Kunwar Pal Singh was returned unexecuted. The second warrant of arrest was issued in the same Form No.70 on 9.2.2012. Before issuing the second warrant of arrest the Regional Collection Amin was reporting about the abscondence of Kunwar Pal Singh and on that account the attachment of immovable properties of Kunwar Pal Singh was ordered by issuing an order in Form No. 71 on 29.8.2011 by the S.D.M., Sadar Budaun as per Rule 244 to 271 of U.P.Z.A.& L.R. Rules and it was handed over to the Regional Collection Amin, namely, Vidya Ram Sharma and a report was submitted by him that the petitioner had already fled away along with the tractor and, as such, Form No.71 could not be executed. On the basis of the aforesaid report about the abscondence and removal of the movable property by Kunwar Pal Singh, the arrest of the petitioner was ordered in the same Form No.70 on 9.2.2012 and in compliance thereof the petitioner was arrested by the Collection Amin because he failed to pay up the loan amount. He was lodged in Tehsil lock-up on 9.2.2012 and was released on 28.2.2012 upon completion of 14 days as required by Section 281 of U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as U.P.Z.A. & L.R. Act or the Act).

7. It was also averred by the State of U.P. that the Regional Collection Amin reported that the petitioner was not ready to deposit the amount due to be paid by him and as such his confinement was ordered by the lawful authorities. On these averments, the State of U.P. justified the action of arresting Kunwar Pal Singh and sending him in to the lock up.

8. While addressing us, Sri Pradeep Kumar Rai, Amicus Curiae, took us to Section 279 of the U.P.Z.A. & L.R. Act and submitted that it was true that arrears of land revenue could be recovered by certain modes of enforcing the recovery as per that provision of U.P.Z.A. & L.R. Act and it is also true that the arrest could also be affected of a person who has an obligation of paying up any dues towards the arrears of land revenue, but there are certain

procedures set down by the Rules framed under the Act for carrying out the procedures of enforcing the recovery of the arrears of land revenue as per the provision of Sections 279 and 280 of the U.P.Z.A. & L.R. Act. In the above context, Sri Rai took us also to Rules 236, 244, 245, 246 & 251 of U.P.Z.A.& L.R. Rules, 1952 and submitted that there was a complete violation of the Rules, especially of Rules 246 and 251 and the whole action of arresting Kunwar Pal Singh and detaining him into prison was not only arbitrary but smacked of executive superiority imposed upon the personal liberty of a person. It was, as such, contended that this Court must hold that Kunwar Pal Singh was deprived of his personal liberty without following the procedure established by law and, thus, the officers of the State of U.P. who were involved in the whole exercise had contravened the provision of Article 21 of the Constitution of India and appear to have illegally and wrongfully confined Kunwar Pal Singh.

9. Submission also was that the arbitrary and illegal acts of the employees of the State of U.P. in violating the fundamental rights of Kunwar Pal Singh by arresting and detaining him required that he be appropriately compensated.

10. Sri Sudhir Mehrotra, learned AGA, attempted to justify the actions of the revenue authority by referring to us different documents which are Annexures to the supplementary affidavit dated 3.7.2012 which contains the statements in justification of the acts of the State of U.P. and its officers.

11. It was submitted before us that in order to recover the loan amount taken out by Kunwar Pal Singh as arrears of land revenue, procedure under Sections 279 and 280 U.P.Z.A. & L.R. Act were to be followed and the revenue authorities who are the custodian of those provisions as regards the process to recover the arrears of land revenue followed the provisions in both later and spirit. The citation was issued by Annexure-1 on 23.5.2011 and it was addressed to Kunwar Pal Singh but as per the report appearing at page 8 of the supplementary affidavit, Kunwar Pal Singh refused to receive the citation for paying up the arrears of land revenue and as such copy of the citation was hung up at a portion of his house and compliance to that particular Rule was certified by obtaining the signature of Latesh s/o Kunwar Pal Singh. Having not appeared before the authority neither paying up the dues, gave rise to issuance of another Citation in Form No.70 on 9.2.2012 and warrant of arrest, firstly, on 29.8.2011 and thereafter on 9.2.2012, as a result of which Kunwar Pal Singh was arrested. The Regional Collecting Amin had reported that Kunwar Pal Singh, after being arrested and produced before the S.D.M. was not ready to pay up the amount due to be paid by him and as such in compliance of Rule 251 he was sent to Tehsil lock-up.

12. For evaluating the rival contentions, we want to point out that in order to recover the arrears of land revenue, there are powers vested in certain authorities in the revenue department to issue coercive processes against a person who is obliged to pay up the arrears of land revenue. Rule 235 of the Rules empowers that processes could be issued against any person having property in a district who is a defaulter regarding payment of arrears of land revenue, after obtaining certificate to that effect. As per Section 3 of the Revenue Recovery Act, a writ of citation or of warrant of arrest along with the warrant of

attachment of movable property are the instruments to be issued as coercive processes for inducing the payment of land revenue. This appears from Rules 235 and 236 of the Rules. Rule 241 of the Rules empowers the Tehsildar of the Tehsil to issue the writ of demand or citation against a defaulter to appear before him. The same order could be issued under the order to be passed either by the Collector of the District or by the Assistant Collector In-charge of the Sub-Division. Rule 245 directs that no writ further than one, could be issued in respect of the same arrear to any defaulter except under the express order of the Collector and in case after issuance of the writ, the arrears of land revenue are not paid within 15 days of the issuance of the writ, more severe measures are promptly to be taken.

13. As regards the service of the writs for making payment of the land revenue, Rule 246 of the Rules is the relevant provision. It requires that writ or citation should be served upon the defaulter personally as far as possible and if in case of the same being not possible or the service not being made personally on him, it may promptly be served upon any of his agents. Again, if the defaulter or his agent both are not found, then what the process server has to do is to hang up a copy of the writ at some conspicuous part of the house of the defaulter. In case the defaulter or his agent is found and the writ is served personally upon any of them, then the counterfoil had to be made over to the defaulter or his agent and the other part of the writ or citation had to be brought to the headquarter, that's the tehsil.

14. Rule 246(2) further requires that in case there is no personal service on the defaulter then the reason has specifically to be shown or recorded as to why the service was not personally made upon the defaulter. Not only that, the officer who is to receive the service report has to also to make a note the particulars of the process being served or not served personally on the process itself.

15. We must point out here that there was no personal service and there was no report submitted by the Collecting Amin as to what was the reason for not serving the writ or citation personally upon the defaulter therein. He was simply reporting that the defaulter Kunwar Pal Singh refused to accept the notice and as such he hung a copy thereof up at some part of his house. The curious part of the report is that the process server in token of the truthfulness of the report, associated as a witness none else than the son of Kunwar Pal Singh who, in our opinion, could have been more competent an agent of Kunwar Pal Singh to be served with the copy of the citation. We do not find any report that any attempt was made by the Collecting Amin, the process server, to ask the son of Kunwar Pal Singh, namely, Latesh, whose name appears in para 4 of the supplementary affidavit, to receive the copy of the citation and issue a receipt in that behalf. This single circumstance about the compliance with Rule 246 has persuaded us to entertain an opinion as if it were an attempt made by the revenue authorities to cover up the acts which were very serious as may appear from our subsequent discussions.

16. The case of the revenue department and its official is that an attachment order having been issued, a report was sent by the attaching authority who was again the same Regional Collecting Amin, that Kunwar Pal Singh

had removed his movable property, like, the tractor and himself had gone into hiding.

17. We find a report appearing at page 14 of the supplementary affidavit which reads that the defaulter had removed his tractor and had gone absconding. The tractor was purchased by the defaulter by taking out a loan from the State Bank of India. We may hold a view that unless the man had held a substantial position in society, he could not have obtained a loan and there could not have been a purpose of purchasing a tractor unless he had substantial landed property and other movable properties. Why then the attachment order was not executed against him by attaching other movable properties of his, we could not find any reason about it. What we find is that the authority who was issuing the warrant of arrest was not unintelligent as to write in his order of attachment that it was not to be executed in respect of all movable properties of Kunwar Pal Singh and that his tractor was only to be attached. As such, we carry an impression as if these reports were after thoughts which were brought into existence only after Kunwar Pal Singh had been arrested to justify the illegal action.

18. Rule 245 of the U.P.Z.A. & L.R. Rules reads that Citation in Form No.70, which is in fact an instrument to authorize the arrest of a defaulter, could not be issued twice. The authority which was issuing Form No.70, i.e., the warrant of arrest against Kunwar Pal Singh, was simply undermining Rule 245 and was issuing the second warrant of arrest in Form No. 70 on 9.2.2012 having earlier issued the same on 29.8.2011 in execution of which Kunwar Pal Singh was arrested.

19. What is the procedure after the defaulter is arrested? Rule 251 (1) requires that whenever a Tehsildar causes a defaulter to be arrested the matter of arrest of such a defaulter has to be reported without delay to the Collector for his information and also to the Assistant Collector In-Charge of the Sub-Division. We do not have any such document before us to satisfy us that Rule 251(1) of the Rules was complied by placing the information before the Collector or the Assistant Collector In-charge. One may argue that the compliance could be oral, but when we consider sub-rule (2) to Rule 251 there could be no difficulty in holding that compliance to the Rule could never be orally shown, specially when it relates to such a serious matter, like, arresting a persons.

20. If it has to be a 'report' then the report has always to be in writing so as to keeping a record of it that Rule 251(1) was duly complied with. There is nothing on record to satisfy us that after his arrest, Kunwar Pal Singh was brought without delay before the Tehsildar who could be the authority to issue Form No. 70 under his signature and why he was sent to custody.

21. In fact we find that the Rules preponderantly forbid sending an arrested defaulter to custody for detention and rather require that such an action curtailing upon the personal liberties of the person be avoided as far as it may be possible. As such the Rule 251 has set down some duties upon the officer before whom such an accused defaulter was to be produced.

22. Rule 251(2) requires that no defaulter shall be detained in custody unless there is reason to believe that the process of his detention in custody would compel in payment either of the whole or substantial

portion of the amount. In our opinion, if a defaulter is arrested and produced before the authority under Rule 251(2) then the authority has to draw up an order noting down the whole situation that the defaulter was not ready to make payment either in full or in part and that his refusal had compelled the authority to authorize his detention in the lock up.

23. Sri Sudhir Mehrotra, learned AGA, drew our attention towards page 19 of the counter affidavit over which is a report submitted by the Collecting Amin to the Tehsildar to the effect that the arrested Kunwar Pal Singh, the defaulter, was being produced before the Tehsildar and that he was not ready to pay any part of the arrears of land revenue.

24. In our considered opinion, this was not the compliance of Rule 251(2) upon which the Tehsildar was authorizing the detention of Kunwar Pal Singh in the lock up. If we consider sub-rule (3) of Rule 251 of U.P.Z.A. & L.R. Rules, 1952 we may find that it is the requirement of that particular sub-rule that on production of the arrested defaulter before the officer who had issued the warrant of arrest, he should give some further time to such a defaulter to pay the arrears instead of detaining him and for that purpose he may release the defaulter on his undertaking to pay the arrear within a fixed period. This particular sub-rule, in our opinion, is not a mere rule of procedure or technicality. In our considered view, this rule creates a right in the defaulter, who had been arrested and who has been produced before the officer ordering his arrest to be informed about his right of being released if he gave an undertaking to pay the arrears either in part or in full as per Rule 251(2) of the Rules.

25. In our considered view the officer before whom the arrested person has to be produced, in such a situation, has a legal obligation cast upon him to inform such an arrested person of his right which is created by Rule 251 (3) of U.P.Z.A.& L.R. Rules and the compliance thereof must also be recorded because it could be held without assigning any reason that release of such a defaulter could never be ordered orally, it has always to be through an order and if that order was to be drawn then the right of the arrested person of being informed of being clothed with a right of availing an opportunity of paying the dues has also to be protected by making a record in writing.

26. Sri Sudhir Mehrotra, learned AGA was asked by us to inform us about the compliance of Rule 251(3) and he was candidly conceding that he did not have any document or record to show that Rule 251 either in part or in full as per its provisions contained in sub-rules (2) and (3) were complied with. We find that the State of U.P. admits that Kunwar Pal Singh was a defaulter. We also do not have anything to find adverse to the stand taken by the State of U.P. and its Revenue Authorities that citation of writ, for realization of arrears of Rs. 2,75,000/- as land revenue, was issued by Annexure 1 at page 6 of the supplementary affidavit. If some one has not paid the dues which is required to be recovered as land revenue under any particular Act and any particular authority was empowered to take steps in that behalf , we cannot decry those steps, if taken validly. We also do not find that no writ was issued and sent for service upon Kunwar Pal Singh, but a doubt has arisen in our minds on the correctness of the service report submitted by one Chandra Pal, the process server, which is dated 23.5.2011. The report stated that Kunwar Pal Singh

was not ready to accept the writ and as such, it was hung up on any particular part of his house and evidence in that behalf was certified by obtaining signature of one of the sons of Kunwar Pal Singh.

27. We have also noted that the son of Kunwar Pal Singh could have been his good agent and there was no reason shown to us as to why no attempt was made to serve copy of the writ upon Latesh son of Kunwar Pal Singh. We find that the Revenue Authorities were simply acting in violation of the Rules framed under different sections of the U.P.Z.A. & L.R. Act.

28. We have already pointed out that a warrant of arrest could be issued once in Form No.70, the second warrant is permissible by Rule 251(3) only when after being released after giving an undertaking for paying up the dues, the defaulter does not pay. In that case the revenue authorities shall be within their rights to issue warrant of arrest again in Form No.70. It is indicated by Rule 251(3) that as soon as there was a report, and in our opinion a fake one about the removal of the tractor by Kunwar Pal Singh and himself having gone into hiding, the authority had issued another warrant, but without express order which is required to be obtained from the Collector as per Rule 245 of the U.P.Z.A.& L.R. Rules. On being arrested Kunwar Pal Singh does not appear being given a chance of exercising his right of giving an undertaking of paying up the dues in part or in full. There was no denial from him.

29. It was only a fake report in our opinion given by the Collecting Amin as appears from page 19 which is dated 9.2.2012 that Kunwar Pal Singh was sent to prison. There is no record that Kunwar Pal Singh was pointed out that he had a right of giving an undertaking to pay up the dues within a specific time.

30. We have already noted that the State of U.P. did not produce any such document or report. There was no further record to show that the officer who had issued the warrant of arrest and before whom Kunwar Pal Singh was produced was satisfied that there was no chance of Kunwar Pal Singh paying up the amount due to be paid by him either in part or in full and as such he was being detained in the Tehsil-lock-up. Thus, we find that the actions of the authorities of the Revenue Department, like, the Tehsildar or the Collecting Amin were completely in infraction of some mandatory Rules and procedures set down by them and, thus, what we find is that not only the issuance of warrant of arrest was frivolous and unsupportable by law but the arrest and confinement of Kunwar Pal Singh into custody was also not supported by the relevant Rules.

31. We simply want to reiterate the old adage that if law requires something to be done in a particular manner, it has to be done in that particular manner or not at all.

32. If the rules set down certain procedures and steps for realization of the arrears of land revenue by following them then the revenue authorities should not have invented their own rule and procedure to justify the illegal and unlawful arrest and detention in custody of Kunwar Pal Singh.

33. We are of firm opinion that in the garb of following Rules the authorities violated and abused the personal liberties of Kunwar Pal Singh and when they found their actions being brought under the scanner of judicial review, they created

documents. Their actions are not only arbitrary but against the Rules. Their actions caused Kunwar Pal Singh to remain in custody from 9.2.2012 to 22.2.2012. This period of confinement was definitely in violation of Article 21 of the Constitution of India as the Revenue Authorities, i.e., Tehsildar, Budaun and Collecting Amin, Budaun appear completely encroaching upon the personal liberties of Kunwar Pal Singh and thereby they wrongfully confined him into custody.

34. Now Kunwar Pal Singh has been released. This information was placed before this Court by an affidavit dated 2.4.2012 and the order drawn by this Court on that date also records the fact subject to the statement being verified by the C.J.M., Budaun. We do not have any other report regarding the stand or information given to the Court by the learned AGA. For the illegal and wrongful confinement of Kunwar Pal Singh, he deserves to be compensated. If the wrongful confinement was in the garb of compliance to Rules or procedure the Court has always to put itself on guard not only to secure the liberties of a person, but also to properly compensate such a person if it comes to a finding that the personal liberty of such a person has been violated and abused.

35. We are of the opinion that a compensation of Rs. 50,000/- shall be appropriate under the facts and circumstances of the case which is required to be paid by the State of U.P. to Kunwar Pal Singh , the petitioner. We direct that the above amount be paid to him within six weeks from the present order and compliance to this order be reported by filing an affidavit.

36. We make it clear that it shall be the prerogative of the State and its authorities to realize the compensation amount from the concerned Tehsildar and Collecting Amin in appropriate proportions.

37. We must record the meaningful assistance rendered to the Court by Sri Pradeep Kumar Rai, Advocate, who was requested to assist as Amicus Curiae. We direct that the High Court Legal Service Committee pay him a fee of Rs.15,000/- for assisting us.

38. This writ petition drawn suo-motu by the Court is disposed of in the above terms.

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**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 11.10.2012**

**BEFORE**
**THE HON'BLE AMAR SARAN, J.**
**THE HON'BLE ANURAG KUMAR, J.**

Criminal Misc. Writ Petition No. 14978 of 2012

**Brahm Pal Panchal ...Petitioner**
**Versus**
**Union of India Thru' Secy. & Others ...Respondents**

**Counsel for the Petitioner:**
Sri Awadhesh Kumar Mishra
Sri Brijesh Upadhyay
Sri Dharampal Singh

**Counsel for the Respondents:**
A.S.G.I./2012/5374
A.G.A.

**Constitution of India, Article 226- Territorial Jurisdiction-in contravention of COFEPOSA Act 1974-petitioner earlier approached before Mumbai High Court-being failure present petition with**

**allegations the business carried at Ghaziabad, property situated at Ghaziabad -petition before High Court Allahabad maintainable-held-misconceived-in view of rule 7 of High Court Rules 1952-dismissal of earlier petition-operate as Resjudicata-second petition not maintainable.**

**Held: Para-21**

**Rule 7 of the Allahabad High Court Rules, 1952, is crystal-clear which says that second writ petition on the same facts would be barred. The Apex Court in Forward Construction Co. Vs. Prabhat Mandal (Regd), Andheri, reported in AIR 1986 SC 391, was pleased to rule that the orders dismissing the first writ petition operates as res judicata between the parties and no second petition on the same facts is maintainable.**

**Case Law discussed:**

AIR 2007 SC 1812; AIR 1986 SC 391

(Delivered by by Hon'ble Anurag Kumar, J.)

1. This writ petition by petitioner, Brahma Pal Panchal, is filed for quashing the impugned detention order dated 25.1.2012 passed by respondent no. 2, namely, Principal Secretary (Appeals and Security), Home Department, Government of Maharashtra and Detenue Authority Mantralaya, Mumbai, Maharashtra.

2. At the very outset, learned AGA raised a preliminary objection regarding the maintainability of this petition in this High Court, contending that this Court has no jurisdiction to hear the case, as the cause of action arose in the Maharashtra and the petitioner's son has already approached the Bombay High Court, but has failed.

3. According to the petitioner, this Court has full jurisdiction to entertain this writ petition as he is the permanent resident of Ghaziabad, U.P., and his office is at Ghaziabad and his all business activities are transacted here. His business premises at Ghaziabad were also searched and the seizure *panchnama* was also prepared at Ghaziabad. On these grounds, learned counsel for the petitioner asserted that this Court has jurisdiction to hear and decide this petition.

4. Before entering into the main controversy, we feel it necessary that the preliminary objection raised by the learned AGA regarding jurisdiction may be considered first and decided upon.

5. The factual matrix of the case is that prior to 21.10.10, approximately 6500 second-hand cranes were imported at Bombay Port by approximately 600 importers during the last five years. The Director of Revenue Intelligence, Mumbai Zonal, gathered an information that several syndicates of crane importers were involved in the evasion of customs duty by undervaluing the said imports. Based on the said intelligence, dated 21.10.10, several simultaneous search operations were conducted by the Director, Revenue Intelligence, Mumbai Zone, Union of India, at different places, including the business premises and workshops of the petitioner at Ghaziabad.

6. Thereafter, summonses were issued to the petitioner and proceedings under the Customs Act initiated. Ultimately, the impugned detention order was passed on 25.1.2012.

7. After issuance of the impugned detention order, the petitioner's son, Pradeep Panchal, filed a petition, being Crl. W.P. No. 1368 of 2012, before the Bombay High Court. In the said petition, various orders

were passed but the arrest of the petitioner was not stayed. On 7.9.12, the Bombay High Court passed an order directing the learned counsel for the petitioner of that case to name the detenu himself as the petitioner. As the necessary amendments have not been carried, the said writ petition has been dismissed for non-prosecution.

8. Learned counsel for the petitioner submitted that this Court has jurisdiction to entertain this writ petition, and in this regard has relied upon the Full Bench decision of the Rajasthan High Court, as reported in **1998 Crl.L.J. 0-3465**: *Umed Mal Vs. Union of India.* He also submitted that the cause of action is a bundle of facts. Part of cause of action or any portion of the cause of action can give rise to the petitioner's right to file a petition in this High Court. The cause of action is to be seen from the pleadings of the parties. When from the pleadings of the petitioner, any part of the cause of action is within the jurisdiction of this Court, then this Court has every and full jurisdiction to entertain the writ petition. The learned counsel has also rlied on **(2006) 6 SCC 207**: *Om Prakash Srivastava Vs. Union of India.*

9. Learned AGA submitted that the cause of action in the present case arose within the jurisdiction of the Bombay High Court and the petitioner has approached the said Hon'ble Court; but when he did not succeed in obtaining any relief therefrom, he has approached this Court. In view of this, it is not open to the petitioner to approach this Court once he has failed to get relief from the Bombay High court, having jurisdiction in the matter. The petitioner cannot create the jurisdiction of this Court by merely asserting on the residence or the search operations in Ghaziabad. It is true that the cause of action is a bundle of facts, which means every fact, which is important for any cause of action and in the absence of such fact, the cause of action comes to an end.In support of his submission, learned AGA has relied on **AIR 2007 SC 1812**: *Alchemist Ltd. Vs. State Bank of Sikkim.*

10. After considering the arguments of both the sides, now we consider the factum of jurisdiction of this Court.

11. Before entering into the controversy in the present case, we may examine the legal position regarding the jurisdiction.

12. In **Black's Law Dictionary**, Ninth edition, at page 251, the phrase **'cause of action'** is defined as "...(1) A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person...

13. According to ***Edwin E. Bryant,*** *The Law of Pleading Under the Codes of Civil Procedure 170* (2d ed. 1899):

"What is a cause of action? Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be - (a) a primary right of the plaintiff actually violated by the defendcant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits or injunction; or (c) it may be that there are doubts as to some duty or right, or the right beclouded by some apparent adverse right or claim, which the plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property.".

14. Article 226 of the Constitution of India, as originally it stood, had two-fold limitations on the jurisdiction of a High Court with regard to its territorial jurisdiction. Firstly, the power could be exercised by it throughout the territories in relation to which it exercises jurisdiction, i.e. the writs issued by the court could not reach beyond the territory subject to its jurisdiction. Secondly, the person or the authority, to whom the High Court is empowered to issue such writs, must be "within those territories" which clearly implies that this must be within its jurisdiction, either by residence or location of his jurisdictional territories. However, by the Constitution (42nd) Amendment Act, 1976, it has been provided that the High Court within the territorial jurisdiction of which a cause of action, wholly or in part arises, shall exercise the power conferred by clause (1) of Article 226, irrespective of whether the State, a government, or an authority to which the writ be issued or the residences of the persons claiming relief is constituted within the territories of that High Court or no. A bare reading of Article 226 shows that the jurisdiction of the High Court depends upon the accrual of the cause of action, wholly or in part, within the territorial jurisdiction of the court.

15. In **Umed Mal** (supra), the Full Bench of the Rajasthan High Court laid down that if the service of the detention order is within the territories of the State of Rajasthan, the Rajasthan High Court will have the territorial jurisdiction to entertain the writ petition. Hon'ble the Supreme Court in **Alchemist Ltd.** (supra), relying on the *State of Rajasthan Vs. M/s. Swaika Properties*, reported in **AIR 1995 SC 1285** [in which it was held that mere service of notice on the petitioner at Calcutta under the Rajasthan Urban Employment Act, 1959, could not give rise to a cause of action unless such notice was integral to the cause of action]. In this case, the facts are that the appellant-company had its registered office at Chandigarh. Negotiations took place at Chandigarh. Letter of proposal and acceptance, and also its rejection thereafter, was communicated at Chandigarh. But the proposal of the appellant-company was not accepted by the State Government at Sikkim it was held that the grounds on which the petitioner claiming the jurisdiction at Punjab and Haryana High Court, is not an integral part or material facts so as to constitute the part of action within the meaning of Article 226 of the Constitution.

16. In *Om Prakash* (supra), Hon'ble Apex Court says that if High Court refuses to consider writ petition by merely observing that though it may have jurisdiction but another High Court deal with the matter more effectively was not a correct way to deal with the writ petition it should hold that no part of the cause of action arose within its territorial jurisdiction.

17. In the present case also, the notice to detain was issued by the authorities of Maharashtra Government from Mumbai and the cause of action to issue the notice also arose at Mumbai where the cranes regarding which the notices were being issued, were imported, i.e. at Mumbai port. The contention of the petitioner that he is residing at Ghaziabad and his premises were also searched at Ghaziabad and the detention order was also issued against him and served upon him at Ghaziabad. In our view, these are not the integral parts of the cause of action.

18. The cause of action is only at Bombay, where the cranes arrived from the

outside, regarding which it is alleged that they were undervalued and not paid the proper custom duty and was guilty under the COFEPOSA Act, 1974. Any person can have houses and offices at different States. Because a person carries out the business at Ghaziabad, would not create a jurisdiction of this Court. This should not be treated as an integral part of the cause of action. Therefore, the jurisdiction lies only with the Bombay High Court, within whose jurisdiction the cause of action arose and lies.

19. In view of the aforesaid, we find no force in the submissions of the petitioner's learned counsel.

20. Here it is also important to reiterate that the petitioner's son has already approached the Bombay High Court regarding the detention order, where he did not succeed. Only thereafter, the petitioner has approached this Court.

21. Rule 7 of the Allahabad High Court Rules, 1952, is crystal-clear which says that second writ petition on the same facts would be barred. The Apex Court in *Forward Construction Co. Vs. Prabhat Mandal (Regd), Andheri*, reported in **AIR 1986 SC 391,** was pleased to rule that the orders dismissing the first writ petition operates as res judicata between the parties and no second petition on the same facts is maintainable.

22. In the result, we find that this Court has no jurisdiction to entertain this petition which is hereby **dismissed on the ground of jurisdiction alone at the preliminary stage.**

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**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 22.11.2012**

**BEFORE**
**THE HON'BLE B. AMIT STHALEKAR, J.**

Civil Misc. Writ Petition No. 16972 of 2000

**Smt.Sajarunnisha & another**
**...Petitioners**
**Versus**
**The D.J. Siddarth Nagar and Others**
**...Respondents**

**Counsel for the Petitioner:**
Sri Jokhan Prasad
Sri S.N. Yadav

**Counsel for the Respondents:**
C.S.C.
Sri D.K. Srivastava

**<u>Constitution of India, Article 226-</u>suit for cancellation of sale deed-on ground of being illiterate lady by playing fraud got execution-Trial Court held-suit before Civil Court maintainable rejecting the objection of defendants regarding ban of Section 49 of U.P. Consolidation of Holding Act-Revisional Court reversed the same by wrongly placing reliance of case law contrary to view of Full Bench decision of Ram Padarath-Trial Court rightly held the suit maintainable before Civil Court.**

**Held: Para-10**

**Thus in view of the above legal preposition settled by the Full Bench of the Allahabad High Court in the case of Ram Padarath (supra) which has been followed by the various other court and has also been affirmed by the Supreme Court in the case of Shri Ram (supra), the suit filed by Masammat Aisha, mother of the petitioners for cancellation of the sale deed before the civil court seeking the relief of cancellation of the sale deed on the ground that the same**

**was obtained by fraud by the respondent no. 2 was maintainable before the civil court and the civil court was fully competent to adjudicate the matter.**

**Case Law discussed:**

2001 ACJ 497; 2008 ACJ 1862; 1998 (89) RD 647

(Delivered by Hon'ble B. Amit Sthalekar, J.)

1. By this writ petition, the petitioners are challenging the order dated 22.2.2000 passed by the respondent no. 1, District Judge, Siddharth Nagar.

2. The facts of the case, in brief, are that one Masammat Aisha, mother of the petitioners filed a suit for cancellation of the sale deed which was alleged to have been executed by Massamat Aisha in favour of respondent no. 2-Smt. Badrunnisha. The case of Smt. Massamat Aisha was that she was an illiterate lady and was the sole owner of the disputed property but by fraud practised upon her, the husband of respondent no. 2 got the sale deed executed in favour of his wife Smt. Badrunnisha by showing himself as the witness in the sale deed. The contention of Massamat Aisha was that in the sale deed there was no consideration mentioned and it was obtained by fraud. She came to know of this fraud on 19.9.1986 and then she filed the suit no. 637 of 1986 for cancellation of the said sale deed before the civil court.

3. Before the civil court, the respondent no. 2 filed her objections that the suit was barred by the provisions of section 49 of the U.P. Consolidation of Holdings Act, 1953 and further objection of the respondent no. 2 was that her name had been recorded in the revenue records prior to the filing of the suit and, therefore, the suit was not maintainable before the civil court and if at all, only the Revenue Court had jurisdiction. However, the respondent no. 2 insisted that the sale deed dated 13.1.1977 was a genuine document and same cannot be questioned.

4. The trial court after hearing the parties, by its order dated 17.4.1998 held that the suit was maintainable before the civil court and was not barred by the provisions of Section 49 of the U.P. Consolidation of Holdings Act. The order dated 17.4.1998 was challenged by the respondent no. 2 in a civil revision no. 31 of 1998 and the court below by its impugned order dated 22.2.2000 has held that since the name of the respondent no. 2 was already mentioned in the revenue records and in any view of the matter the civil court had no jurisdiction in view of the specific bar created by Section 49 of the U.P. Consolidation of Holdings Act. So far as the various case law cited before the court below, it was held that all those cases related to the objections arising under the U.P. Zamindari Abolition and Land Reforms Act, 1950 wherein the objection was that the proceedings before the civil court were not maintainable in view of the provisions of Section 331 of the Act of 1950 and since this matter arises out of the proceedings under the provisions of U.P. Consolidation of Holdings Act, therefore, the case law cited by the petitioner-respondents before the revisional court had no application to the facts of the case and the civil court therefore, had no jurisdiction to entertain the suit.

5. I have heard Shri Jokhan Prasad, learned counsel for the petitioner. This matter is listed in the cause list as peremptory. No one appears on behalf of the respondent no. 2. Learned standing counsel appears for the respondent no. 1.

6. The first submission of the learned counsel for the petitioner is that since the name of Smt. Massamat Aisha stood recorded in the revenue records even prior to the filing of the civil suit, therefore, it was not necessary for her to approach the civil court for declaration of her rights and filing a suit under section 229-B of the U.P. Zamindari Abolition and Land Reforms Act, 1950 and the only remedy available for her is to file a civil suit for cancellation of the sale deed on the ground that the sale deed had been obtained by fraud. In this regard he has placed reliance upon a decision of the Supreme Court reported in ***2001 ACJ 497 Shri Ram and another Vs. I Addl. District Judge and others*** wherein the Supreme Court while considering the Full Bench decision of Allahabad High Court reported in 1989 ACJ 1 Ram Padarath V. Second ADJ, Sultanpur held that where the name of the plaintiff already stood recorded in the revenue records and there was necessity for cancellation of a sale deed on the ground that it was obtained by fraud it was not necessary for the plaintiff to approach the revenue authority by filing a suit for declaration since the land already stood recorded in his name. However in cases where the land was never recorded in the name of the plaintiff and yet the plaintiff sought to challenge the sale deed by filing a suit for declaration it is only in these circumstances that he would have to approach the revenue court. Relevant paragraph 7 of the judgment of the Supreme Court reads as under:

*"7. On analysis of the decisions cited above, we are of the opinion that where a recorded tenure holder, having a prima facie title and in possession files suit in the civil Court for cancellation of sale deed having obtained on the ground of fraud or impersonation cannot be directed to file a suit for declaration in the revenue Court reason being that in such a case, prima facie, the title of the recorded tenure holder is not under cloud. He does not require declaration of his title to the land. The position would be different where a person not being a recorded tenure holder seeks cancellation of sale deed by filing a suit in the civil Court on the ground of fraud or impersonation. There necessarily the plaintiff is required to seek a declaration of his title and, therefore, he may be directed to approach the revenue court, as the sale deed being void has to be ignored for giving him relief for declaration and possession."*

7. The next decision cited by the learned counsel for the petitioner is reported in **2008 ACJ 1862 Smt. Kalawati and another Vs. A.D.J. Shahjahanpur and another,** wherein the learned Single Judge of this Court has held that for the purposes of cancellation of a void document such as a fraudulent sale deed or a will deed, the appropriate court is the civil court. The relevant paragraphs 8, 9 and 10 of the judgment reads as under:

"8. In the above Section, the word 'void' has been used before the word 'voidable'. Under the aforesaid Section, there is no substantial difference between declaring an instrument as void or cancelling the same. By virtue of this Section, not only cancellation of voidable document is permissible but cancellation of void document is also permissible.

9. Accordingly, it cannot be said that suit for cancellation of void document is not maintainable before the Civil Court as its cancellation is not necessary and a mere

declaration, which may be granted by revenue Court, is sufficient.

10.Accordingly, writ petition is allowed. Impugned order passed by revisional Court is set aside. It is held that suit is maintainable before the civil court."

8. From a perusal of the impugned order dated 22.2.2000 it will be seen that the court has held that the case law cited by the petitioner related to the proceedings under the U.P. Zamindari Abolition and Land Reforms Act, 1950 particularly the bar created by the provisions of Section 331 of the said Act whereas the case in hand related to an objection with regard to the maintainability of the civil suit in view of the bar created by section 49 of the U.P. Consolidation of Holdings Act and, therefore, the case law referred to in the impugned judgment had no application in the case of the petitioner. One of the cases mentioned in the impugned order is of Smt. Chhanga Vs. I A.D.J. Jaunpur.

9. Learned counsel for the petitioner has placed before this Court the said judgment which is reported in **1998 (89) RD 647 Smt. Chhanga and another Vs. Ist Addl. District Judge, Jaunpur.** The case of Smt. Chhanga is a case which arises under the U.P. Consolidation of Holdings Act wherein the objection was raised not only with regard to the maintainability of section 49 of the U.P. Consolidation of Holdings Act but also the maintainability under section 331 of the U.P. Zamindari Abolition and Land Reforms Act. The Court relying upon the Full Bench decision of the Allahabad High Court in the case of Ram Padarath (supra) has held that the suit filed before the civil court for cancellation of the sale deed on the ground of the same being void was maintainable before the civil court. The relevant paragraphs 10, 13 and 14 reads as under:

"10. The decision in the case of Smt. Dulari Devi (supra) was a decision in which the question as to the cognizance of the suit by the consolidation authorities under the U.P. Consolidation of Holdings Act, 1954 was under consideration in relation to Section 49 thereof which barred the jurisdiction of the civil court. There it was held that where a deed is void the same cannot be ignored by the consolidation authorities and, therefore, it can be within the jurisdiction of the consolidation authorities to decide the dispute and as such the said suit in respect whereof void deed was involved was hit by Section 49 of the U.P. Consolidation of Holdings Act. Under Section 49 of the U.P. Consolidation of Holdings Act the suit which could be or ought to be brought under the said provisions of the Act were hit by Section 49 as being barred in the civil court. The provisions of sub-section 49 is little different from that of Section 331 though in substance both are almost same. But the distinguishing feature in both Section 49 of the U.P. Consolidation of Holdings Act and Section 331 of U.P. Z.A. And L.R. Act is that in both cases the court is being brought within the purview of U.P. Consolidation of Holdings Act or under the U.P. Z.A. And L.R. Acts for a relief which could be had from the authority mentioned in both the Acts were prohibited from being proceeded with by a civil court. Thus in one aspect both the sections were common. Now as I have observed above that the proceedings involved in this case does not come within the purview of Section 331 and, therefore, the said provision of Section 331 cannot be attracted in the present case and the

decision in the case of Smt. Dulari Devi (supra), therefore, cannot be attracted. In the said case it has not been laid down that wherever a void deed is involved, the suit is to be preferred before the revenue authority irrespective of the satisfaction of the conditions contained in Section 49 vis a vis Section 331 if that can be stretched to such an extent. The said decision can be distinguished only on the facts that the same relates to Section 49 of the U.P. Consolidation of Holdings Act but since there is something common in the two sections, in my view the distinguishing feature is the question as to whether the relief could be had within the ambit of special statutes being the revenue law concerning this case. As I have found that it cannot be had within the ambit of any provisions contemplated within the revenue law, therefore, that decision does not help Mr. P. Chandra, learned counsel for the petitioner.

11. .....

12. .....

13. I am unable to persuade myself to agree with the contention of Mr. Prem Chandra in the facts and circumstances of the case, inasmuch as in the present case admittedly the name of the defendant was recorded as tenure holder only by virtue of the alleged sale deed, therefore, for the purpose of seeking cancellation of the sale deed prima facie the plaintiff had a title in respect of the property which was recorded in her name prior to the alleged execution of the sale deed. If the name of the defendant has been recorded subsequent to the alleged execution of the sale deed that will not turn the table to dispel the ratio decided by the Full Bench in the present case. Then again the relief that might be claimed by the plaintiff would be only a consequential relief, if she succeeds in getting the sale deed cancelled. However, she has not asked for any such relief. If relief in the suit is granted it would not necessarily change any status or right between the parties. In case she fails in the suit then also no status or right under the revenue authority is required to be adjudicated upon. Therefore, the ration decided by the Full Bench as referred to in the case of Ram Padarth (supra) applies in the present case with full force. Same view has been taken by this court following the decision in the case of Ram Padarth (supra) by a learned Single Judge in the case of Dwarika Singh Vs. The District Judge, Jaunpur and others. Similar view was taken in the decision in the case of Sadaruddin and others V. District Judge, Allahabad and other that too by me relying on the decision in the case of Ram Padarth (supra). The decision in the case of Ram Padarth (supra) was also followed in the case of Radhey Shyam V. District Judge, Gorakhpur and others. The decision of Full Bench in the case of Ram Padarth (supra) was relied upon by the Supreme Court in the case of Bismillah Vs. Janeshwar Prasad.

14. In view of the discussion made above I have not been able to agree with the contention of Mr. Prem Chandra who argued with great vehemence. On the other hand I am in agreement with the decision given by the learned Addl. District Judge Ist Court Jaunpur on 20.3.1991 in Civil Revision No. 205 of 1989 and hold that the present case is maintainable before a civil court."

10. Thus in view of the above legal preposition settled by the Full Bench of the Allahabad High Court in the case of Ram

Padarath (supra) which has been followed by the various other court and has also been affirmed by the Supreme Court in the case of Shri Ram (supra), the suit filed by Masammat Aisha, mother of the petitioners for cancellation of the sale deed before the civil court seeking the relief of cancellation of the sale deed on the ground that the same was obtained by fraud by the respondent no. 2 was maintainable before the civil court and the civil court was fully competent to adjudicate the matter.

11. Learned counsel for the petitioner has further raised an objection that during the pendency of the suit proceedings which was earlier filed in the civil court, Siddharth Nagar, the District Siddharth Nagar was bifurcated and a new district Basti was created and Tehsil Bhanpur wherein the land in dispute is situated fell within the jurisdiction of the civil court, Basti and, therefore after the creation of the new district of Basti and the allocation of Bhanpur Tehsil to district Basti, all the proceedings pending before the judgeship of Siddharth Nagar would now be cognizable by the judgeship of Basti.

12. Be that as it may, it will be open for the petitioner to raise this objection before the concerned court which shall consider the same and if the court is satisfied that the matter is cognizable by the civil court Basti it will immediately transfer the suit no. 637 of 1986 to the appropriate court in the district court, Basti.

13. For the aforesaid reasons the writ petition is allowed and the impugned order dated 22.2.2000 is quashed.

14. There shall be no order as to cost.

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**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 30.10.2012**

**BEFORE**
**THE HON'BLE SUDHIR AGARWAL, J.**

Civil Misc. Writ Petition No.19834 OF 2003

**Sri Om Prakash ...Petitioner**
**Versus**
**Sri Anil Kumar ...Respondent**

**Counsel for the Petitioner:**
Sri Madhav Jain
Sri Manish Goyal
Sri Shri Krishna Shukla

**Counsel for the Respondents:**
S.C.
Sri M.K.Gupta
Sri Pankaj Agarwal

**Uttar Pradesh Urban Buildings(Regulation of Letting Rent and Eviction)Act 1972-Section 20(4)- eviction on default of payment in rent-on refusal rent deposited under section 30(1) with permission of Court-first date of hearing-by wrong interpretation held defaulter-while on first date of hearing i.e. on 25.08.95-if deposit under section 30 taken into consideration-tenant deposited much more excess than amount required-Revisional Court rightly interfered by rejecting application for ejectment.**

**Held: Para-28 & 30**

**The amount thus deposited by respondent tenant upto 25.8.1995 exceed much more than what he was required to deposit and there is no scope of any argument that he has not complied with requirement of Section 20(4) of Act, 1972.**

**In view of the above discussion, revisional order in so far as it has held**

**that suit filed by landlord-petitioner was liable to be dismissed cannot be faulted.**

**Case Law discussed:**
2002(2) ARC 160; 1993(2) ARC 451; 1995(1) ARC 563; (1999) 8 SCC 31; 2004(2) ARC 659; 1993 (4) SCC 406; 2002 (3) SCC 49; AIR 2002 SC 2520; 2001(2) AWC 1468; 2004 (56) ALR 460; 2004(57) ALR 233; 2005 (60) ALR 697; 2006 (3) ARC 657; 2006 (2) ARC 208

(Delivered by Hon'ble Sudhir Agarwal, J)

1. Heard Sri Manish Goyal, learned counsel for the petitioner and Sri Pankaj Agarwal, holding brief of Sri M.K.Gupta, learned counsel for the respondent.

2. The landlord, having failed in his attempt to evict his tenant on the ground that there has been default in payment of rent, has come to this Court by means of present writ petition, filed under Article 226 of the Constitution.

3. The petitioner, Om Prakash, is owner and landlord of shop No.2/27, Seth Gali, Agra. Anil Kumar, the sole respondent, is the tenant. The petitioner filed suit no.47 of 1995 alleging that respondent-tenant has committed default in payment of rent since 1.4.1989 and despite issuance of registered notice dated 19.1.1991, served upon the tenant personally on 23.1.1991, rent has not been paid hence his tenancy stood terminated and he is liable for eviction. He also sought a decree of recovery of arrears of rent, damages and mesne profit.

4. The respondent-tenant contested suit stating that rent sent by money order but landlord declined to accept the same whereafter it was deposited under Section 30(1) of Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 *(hereinafter referred to as "Act, 1972")* in Misc. Case No.93 of 1989. The notice received from landlord was duly replied and information of aforesaid deposit was also given, hence, the suit is liable to be dismissed.

5. The Trial Court i.e. Judge Small Cause Court, Agra vide judgment dated 14.3.1997, decreed the suit holding that whatever amount was paid by tenant up to the date of "first hearing" in order to seek benefit under Section 20(4) of Act, 1972, it comes to Rs.8,137/- though he was supposed to pay Rs.8,257=15. There was a deficiency of Rs.120.15 which is a substantial amount, hence tenant is not entitled for benefit under Section 20(4) of the Act.

6. The matter was taken in the Court of Additional District Judge, Court No.3, Agra in Civil Revision No.76 of 1997 by tenant, where he succeeded and revision was allowed. Hence this writ petition.

7. Sri Manish Goyal, learned counsel for the petitioner submitted that entire dues, as contemplated in Section 20(4) of Act, 1972 were not paid by tenant on the first date of hearing and therefore, Appellate Court has erred in law in reversing decision of Trial Court. He pointed out that suit was registered on 22.5.1995. Summons were issued fixing 25.7.1995, for hearing. The written statement dated 17.7.1995 was taken on record by Trial Court on 25.7.1995 and then fixed 24.8.1995 for hearing. It is said that tenant deposited Rs.913/- on 11.7.1995 vide tender dated 11.7.1995 and Rs.6800/- on 25.8.1995. Subsequently, he deposited Rs.424.40 on 5.12.1995.

8. It is said that Rs.424.40, deposited on 5.12.1995 would not come to rescue respondent-tenant for the purpose of benefit under Section 20(4) of Act, 1972 and the revisional Court has erred in law by giving credit to the said payment without looking into the fact that first date of hearing could be 25.7.1995 and any deposit made thereafter shall not give any advantage to the tenant for the purpose of Section 20(4) of Act, 1972. Further, he said that even Rs.6800/- deposited on 25.8.1995 would not call for any credit for the purpose of attracting Section 20(4) of Act, 1972. The Court below in treating 1st May 1996 as "first date of hearing" has erred in law and therefore, impugned revisional judgment is liable to be set aside. In order to demonstrate as to what constitute "first date of hearing" he cited several authorities of Apex Court i.e. **Ashok Kumar & Ors. Vs. Rishi Ram & Ors, 2002(2) ARC 160; Siraj Ahmad Siddiqui Vs. Prem Nath Kapoor, 1993(2) ARC 451, Advaita Nand Vs. Judge, Small Causes Court, Meerut & Ors., 1995(1) ARC 563; Sudershan Devi & Anr. Vs. Sushila Devi & Anr., (1999) 8 SCC 31, and this Court's judgment in Krishna Kumar Gupta Vs. XIVth Additional District Judge, Allahabad & Ors., 2004(2) ARC 659.**

9. Sri Pankaj Agarwal, Advocate holding brief of Sri M.K.Gupta, Advocate however supported the revisional judgment on the strength of reason contained therein.

10. The expression "first hearing" has been explained in Section 20(4) Explanation (a) and reads as under:

*"the expression "first hearing" means the first date for any step or proceeding mentioned in the summons served on the defendant."*

11. This expression has been considered by Apex Court in **Ved Prakash Wadhwa (supra).** It was held that the date of "first hearing would not be before a date fixed for preliminary examination of parties and framing of issues". Similar was the view taken in an earlier judgment also in **Advaita Nand (supra).**

12. A three-Judge Bench of Apex Court also considered this issue in **Siraj Ahmad Siddiqui Vs. Prem Nath Kapoor, 1993 (4) SCC 406** and said as under

*"The date of first hearing of a suit under the Code is ordinarily understood to be the date on which the court proposes to apply its mind to the contentions in the pleadings of the parties to the suit and in the documents filed by them for the purpose of framing the issues to be decided in the suit. Does the definition of the expression 'first hearing' for the purposes of Section 20(4) mean something different? The "step or proceedings mentioned in the summons" referred to in the definition should we think, be construed to be a step or proceeding to be taken by the court for it is, after all, a "hearing" that is the subject matter of the definition, unless there be something compelling in the said Act to indicate otherwise; and we do not find in the said Act any such compelling provision. Further, it is not possible to construe the expression "first date for any step or proceeding" to mean the step of filing the written statement, though the date for that purpose may be mentioned in the summons, for the reason that, as set out earlier, it is permissible under the Code for the defendant to file a written statement*

*even thereafter but prior to the first hearing when the court takes up the case, since there is nothing in the said Act which conflicts with the provisions of the Code in this behalf. We are of the view, therefore, that the date of first hearing as defined in the said Act is the date on which the court proposes to apply its mind to determine the points in controversy between the parties to the suit and to frame issues, if necessary."*

13. Again it was considered in **Sudarshan Devi (supra)** and held that the date fixed for hearing of the matter is the date of first hearing and not the date fixed for filing of written statement. The Court observed that emphasis in the relevant provision is on the word "hearing". The Court also relied on its earlier decision in **Ved Prakash Wadhwa (supra).**

14. The matter again came to be considered in **Mam Chand Pal Vs. Shanti Agarwal (Smt.), 2002 (3) SCC 49.** Therein the suit was filed on 5.12.1988 and summons were issued fixing 19th January, 1989 for filing of written statement and 27th January, 1989 for hearing. The defendant was not served. The order was passed for service of notice on the defendant by publication fixing 3.7.1989 for hearing. By mistake in the publication, the date of hearing was shown as 26.4.1989 instead of 3.7.1989. On 26.4.1989, Presiding Officer was not available having proceeded for training. The case was thereafter adjourned to 11.5.1989 and further gone on adjournment for one or the other reasons on several dates. The Court held that in the present case 26th April, 1989 would not be regarded as "first date of hearing" since on that date the Presiding Officer was not available. In para 7 the court said, "where the Court itself is not available it could not be treated as the date of first hearing".

15. In **Ashok Kumar & Ors. Vs. Rishi Ram and others, AIR 2002 SC 2520**, the Court noticed distinction between the phraseology in Order XV, Rule 5 C.P.C. and Explanation (a) to sub-section (4) of Section 20 of Act, 1972 and in para 8, said:

*"Rule 1 of Order V speaks of issue of summons. When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day specified therein. Rule 2 thereof enjoins that the summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement. Rule 5 of Order V says that the Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit which shall be noted in the summons. However, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit. It may be apt to notice here that Sub-section (3) of Section 20 of the Act was deleted in U.P. Civil Laws Amendment Act, 1972 with effect from September 20, 1972 and Rule 5 was inserted in Order XV of the Civil Procedure Code which deals with disposal of the suit at the first hearing. Explanation 1 to Rule 5 of Order XV defines the expression "first hearing" to mean the date for filing written statement or for hearing mentioned in the summons or where more than one of such dates are mentioned, the last of the dates mentioned. But the said expression, as noticed above, is defined in Clause (1) of Explanation to Sub-section (4) of Section 20. Section 38 of the U.P. Act says that the provisions of the said Act shall have effect notwithstanding*

*anything inconsistent therewith contained in the Transfer of Property Act or in Code of Civil Procedure, therefore, the definition contained in Clause (a) of Explanation to Sub-section (4) of Section 20 of the Act will prevail over the definition contained in Rule 5 of Order XV of the Code of Civil Procedure as applicable to the State of U.P. It is too evident to miss that in contra-distinction to the "filing of written statement" mentioned in the definition of the said expression contained in Rule 5 of Order XV, the language employed in Clause (a) of the Explanation to Section 20(4) of the U.P. Act, refers to 'the first date for any step or proceeding mentioned in the summons served on the defendant'. In our view those words mean the first date when the court proposes to apply its mind to identify the controversy in the suit and that stage arises after the defendant is afforded an opportunity to file his written statement." (emphasis added)*

16. In para 12 of the judgment in **Ashok Kumar (supra)**, considering the above observation and also relying on its earlier decisions in **Sudershan Devi (supra), Advaita Nand (supra)** and **Siraj Ahmad Siddiqui** (supra), the Court said:

*"Now adverting to the facts of the case on hand it has been noticed above that the suit was posted on May 20, 1980 for final disposal but that date cannot be treated as the first hearing of the suit as the Court granted time till July 25, 1980 to the tenant for filing written statement. On July 25, 1980 time was extended for filing written statement and the suit was again adjourned for final disposal to October 10, 1980. Inasmuch as after giving due opportunity to file written statement the suit was posted for final disposal on October 10, 1980 it was that date which ought to be considered as the date fixed by the Court for application of its mind to the facts of this case to identify the controversy between the parties and as such the date of first hearing of the suit."*

17. It also held that once the date of "first hearing" is determined and thereafter the case is adjourned, the date of first hearing of the suit would not change on every adjournment of the suit for final hearing.

18. Thus the effective date of first hearing of the suit should be, when the Court proposed to apply its mind. Therefore it would be the date fixed earliest for final disposal/hearing and not adjourned for reasons attributable to the defendant-tenant. There are certain decisions of this Court also and I need not to burden this judgment giving in detail all such judgments except of making reference of some of those hereto i.e **Mohd. Salim alias Salim Uddin Vs. 4th Addl. District Judge, Allahabad & Ors. 2001(2) AWC 1468, Har Prasad Vs. Ist A.D.J., Etah 2004 (56) ALR 460, Jai Ram Dass Vs. Iind Addl. District Judge, Jhansi & Ors. 2004(57) ALR 233, Chaturbhuj Pandey Vs. VI A.D.J., Kanpur & Ors. 2005 (60) ALR 697, Hira Lal & Ors. Vs. Ram Das 2006 (3) ARC 657 and Saadat Ali Vs. J.S.C.C., Moradabad & ors. 2006 (2) ARC 208.**

19. In the present case the written statement was filed on 25.7.1995 whereafter 24.8.1995 was fixed as the date for first hearing but on that date there was some holiday and the matter was taken up on 25.8.1995 which, in my view, should have been the first date of hearing. All deposits made thereon or till that date are liable to be given due credit to find out

whether there is compliance of requirement of Section 20(4) of Act, 1972 or not.

20. The Revisional Court has found that there was some discrepancy in the calculation of total dues and exact amount comes to Rs.8043/-, which ought to have been deposited by tenant upto the first date of hearing, but he had deposited Rs.8137/-. While arriving at the figure of Rs.8137/- he (revisional Court) has included Rs.424.40 deposited by tenant on 5.12.1995. If the amount of Rs.424.40 is excluded from total deposit, it comes to Rs.7712.60 showing a deficiency of Rs.331/- if the computation of required amount is found correct. Whether the deficiency of such amount would constitute a negligible amount or not is a separate issue. In my view, probably that would not be required to be looked into in the present case in view of the argument advanced by learned counsel for the respondent which is more substantive and has enough weight to prevail over the entire case.

21. Sri Pankaj Agarwal, learned counsel for the respondent-tenant contended that a tenant would be said to be in default to attract liability of eviction only if the conditions under Section 20(2)(a) of Act, 1972 are satisfied. It reads as the tenant must be in arrears of rent for not less than four months and has failed to pay the same to landlord within one month from the date of service upon him of the notice of demand. He pleaded that landlord did not receive rent from April, 1989 whereafter it was remitted by money order. That was also declined, hence in Misc. Case No.93 of 1989, rent was deposited under Section 30(1) of Act, 1972. The aforesaid deposit was recognized and honoured by landlord by issuing rent receipt No.306 dated 3.9.1989. The monthly rent thereafter continued to be paid in Misc. Case no.93 of 1989 and in view of Section 30(6), the amount deposited by respondent-tenant has to be "deemed payment" made to the landlord. Therefore, on 19.1.1991, when notice was issued, respondent-tenant was not in arrears of any amount of rent. The question of termination of his tenancy by notice dated 19.1.1991 would not arise. He further contended that it is not the case of petitioner-landlord that there is any subsequent default on the part of tenant in respect whereto his tenancy has been terminated.

22. Sri Manish Goyal, in reply to the above contention, stated, that such payment under Section 30(1) can be honoured only till the demand is not made by landlord. In the present case, even after receipt of notice dated 19.1.1991, tenant continued to make deposit in Misc Case No.93 of 1989 and therefore, entire deposit made shall not qualify for any purpose as it is wholly illegal.

23. As a proposition of law, what has been contended by Sri Manish Goyal cannot be accepted, inasmuch as, deposit of rent under Section 30(1) is permissible only till landlord expressed his willingness to accept rent. The notice dated 19.1.1991 was served upon the tenant on 23.1.1991. Therefore the rent payable for the month of February, 1991 and onwards ought to have been paid to the landlord directly and for that purpose deposit made under Section 30(1) cannot be looked into. But the deposit made for the month upto December, 1990 cannot be said to be vitiated in law for any purpose. Therefore, to find out whether there is any default on the part of tenant or not, what one has to

look into is deposit made under Section 30(1) after December, 1990, and not for earlier period.

24. If the first date of hearing is taken to be 25.8.1995, it would mean that in order to comply requirement of Section 20(4), besides other expenses, tenant was required to deposit rent payable for the month upto July, 1995. Since the deposit of rent upto December, 1990 under Section 30(1) was liable to be taken into account, the tenant was liable to deposit rent from January, 1991 to July,1995 and other expenses in the Court below. It means that rent of 55 months besides other expenses was to be deposited with the Trial Court.

25. In the present case Court below has looked into the date of first hearing as 1.5.1996 and thereupon has calculated entire dues. This is apparently not correct. If the date of first hearing is taken to be 21.8.1995, one has to find out whether the amount payable upto that date stood paid or not.

26. As is already discussed above, tenant paid Rs.7713/- upto 25.8.1995 with the Trial Court i.e. Rs.913/- on 11.7.1995 and Rs.6800/- on 25.8.1995, which comes to Rs.7713. Against it, rent payable upto 25.8.1995 from January 1991 comes to Rs.3300/- and water tax @ Rs.7 per month comes to Rs.385/-. The total comes to Rs.3685/-. The amount of expenses have been taken as Rs.496.75 towards Court fees, Advocate fees Rs.124/-, clerkage Rs.12.50, Rs.240/- towards notice expenses and Rs.1470.32 towards interest. This interest has been calculated for a much longer period i.e. upto December, 1995. Even if all these expenses, as they are, are taken, it would come to Rs.2343.57. The total amount, thus, comes to Rs.6028.57 (Rs.3685/- + Rs.2343.57).

27. With the aforesaid amount, rent paid by the tenant for the period of April, 1989 to December, 1990 under Section 30(1) is also liable to be given due credit in view of Sub-Section (4) of Section 20 of Act, 1972.

28. The amount thus deposited by respondent tenant upto 25.8.1995 exceed much more than what he was required to deposit and there is no scope of any argument that he has not complied with requirement of Section 20(4) of Act, 1972.

29. Therefore, it cannot be said that respondent-tenant was liable for eviction from accommodation in question. The Revisional Court, therefore, has rightly allowed revision though in ultimate calculation of amount required to be deposited under section 20(4) of Act, 1972 etc., I find some glaring irregularity in orders of both the courts below and have discussed herein above from what is apparent and evident from record without disturbing the actual amount, date of payment etc.

30. In view of the above discussion, revisional order in so far as it has held that suit filed by landlord-petitioner was liable to be dismissed cannot be faulted.

31. The writ petition therefore, lacks merit.

32. Dismissed.

33. Interim order, if any, stands vacated.

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**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 01.11.2012**

**BEFORE**
**THE HON'BLE SIBGHAT ULLAH KHAN, J.**

Civil Misc. Writ Petition No. 26493 of 2006

**Reetesh Kumar Singh ...Petitioner**
**Versus**
**Regional Secretary Board of High School & Intermediate Edu. ...Respondents**

**Counsel for the Petitioner:**
Sri Arvind Singh

**Counsel for the Respondents:**
C.S.C.

**Constitution of India, Article 226- Principle of Natural Justice-cancellation of Intermediate marks sheet-with direction to returned the mark sheet-on ground petitioner was caught red-handed using unfair means-rejection of representation challenged on ground of opportunity if hearing as well as on equity as petitioner had passed B.A.-II year examination-petitioner unable to show if opportunity provided what plausible explanation would be given about using unfair means-even after getting marks sheet under "W.A." took admission in B.A. Part I and II-inference drawn about uses of unfair means-perfectly justified.**

**Held: Para-8**

**Learned counsel for the petitioner has further argued that petitioner has passed B.A. and cancellation of intermediate result would cause irreparable loss to him. This argument cannot be accepted. If petitioner did not pass intermediate and was found using unfair means then no sympathetic view can be taken. Moreover, such sympathy would encourage cheating in examination and approaching the authorities and the courts after several years so that records may be weeded out and a student may say whatever he likes.**

**Case Law discussed:**
2000 (3) U.P.L.B.E.C. 2760; AIR 2000 SC 2783; 2007 (4) SCC 54

(Delivered by Hon'ble Sibghat Ullah Khan, J.)

1. Heard learned counsel for the petitioner and learned standing counsel for the respondents.

2. Petitioner appeared in the intermediate examination in the year 2002 conducted by U.P. Board of High School and Intermediate as an student of Mahabodhi Inter College, Sarnath Varanasi from examination centre S.G. Inter College, Gaurakala, Charigaon, Varanasi. Petitioner's computerised marksheet showing him passed had been sent to the college in question however through order dated 27.12.2002 issued by the Board, the marksheet was required to be sent back. The letter was written to the principle of the college. The earlier marksheet had been issued under the category "WA'. The marksheet was directed to be returned on the ground that petitioner while attempting Physics-II paper had been caught red handed using unfair means. The allegation of the petitioner is that he was not aware of cancellation of his result and in the year 2003 he wanted intermediate certificate which was not made available to him by the clerk of the college. It is mentioned that thereafter on 10.02.2004 petitioner approached the Principal again who asked him to file application before the Board therefore on the said date he filed application to the respondent No.1, Regional Secretary, Board of High School and Intermediate Education, Regional Office, Varanasi through the Principal

(paras 8 & 9 of the writ petition). Thereafter, petitioner filed writ petition in this court being Writ Petition No.5531 of 2006, which was disposed of on 30.01.2006 with liberty to file fresh representation, which was accordingly done by the petitioner. The said representation was disposed of/ dismissed on 24.03.2006 by respondent No.1, copy of which is Annexure-VII to the writ petition, which has been challenged through this writ petition. It is mentioned in the said order that petitioner's result of physics-II paper had been cancelled on the ground that he was caught red handed using unfair means. It has been stated that after getting the marksheet under "W.A.' category, petitioner took admission in B.A. and passed I and II year of B.A.

3. Learned counsel for the petitioner has placed reliance upon a Division Bench authority of this Court reported in **Jayanti Prasad Dwivedi Vs. University of Allahabad and others, 2000 (3) U.P.L.B.E.C. 2760** holding that if result is cancelled on the ground of using unfair means notice and opportunity of hearing should be provided to the candidate.

4. In the rejoinder affidavit, it has been stated that petitioner also passed B.A.-III in the year 2006.

5. Para-15 of the writ petition is quoted below:

*"That, the petitioner did not adopt any unfair means in aforesaid examination and materials which were alleged to be recovered from the petitioner were not used by him and as such decision taken by the decision committee is behind the back of the petitioner does not sustainable in the eye of law."*

6. In view of the above clear cut admission there remains/ remained nothing to be decided further. Even if for the sake of argument it is assumed in favour of the petitioner that opportunity of hearing was not granted to the petitioner still in view of Supreme Court authorities reported in **A.M.U. Aligarh Vs. M.A. Khan, AIR 2000 SC 2783 and Ashok Kumar Sonekar Vs. Union of India, 2007 (4) SCC 54**, holding that in case petitioner challenges an action on the ground of denial of opportunity of hearing through writ petition, then in the writ petition he will have to show that in case opportunity had been provided, what plausible cause would have been shown by him. In the instant case after categorical admission of the petitioner in the above quoted para-15 of the writ petition of being in possession of unauthorised material no fault can be found with the cancellation of the result order. Petitioner admits that he was having materials connected with the paper in question. If a student has got with him the material relating to the answers of the paper which he is writing no other inference can be drawn except that he has used unfair means. It is not at all necessary to further show that the invigilator actually saw him copying from the material in his answer sheet.

7. Moreover according to the own case of the petitioner after June, July 2002 when the result must have been declared, he filed the first application before respondent No.1 on 10.02.2004. In para-6 of the counter affidavit it has been stated that through letter dated 19.02.2003 information of cancellation of result had

been sent to the petitioner through his college (Mahabodhi Inter College, Sarnath Varanasi) and that the unauthorised material recovered from the petitioner etc. had been weeded out according to the relevant Rules. As far as sending the application to respondent No.1 dated 10.02.2004 is concerned in para-10 of the counter affidavit receipt of any such application has been denied. Even in para-9 of the writ petition only this much has been stated that the alleged representation dated 10.02.2004 was sent to respondent No.1 through respondent No.2, Principal of the college in question. There is absolutely no explanation as to why no representation was directly sent to respondent No.1. In fact after cancellation of the result in December, 1992/ January, 1993 the first thing which the petitioner did was filing the earlier writ petition (Writ Petition No.5531 of 2006). All the records pertaining to cancellation of result had been weeded out meanwhile. Accordingly, even the allegation that opportunity of hearing was not provided to the petitioner cannot be accepted. By approaching this court and respondent No.1 quite late, petitioner allowed the records to be weeded out.

8. Learned counsel for the petitioner has further argued that petitioner has passed B.A. and cancellation of intermediate result would cause irreparable loss to him. This argument cannot be accepted. If petitioner did not pass intermediate and was found using unfair means then no sympathetic view can be taken. Moreover, such sympathy would encourage cheating in examination and approaching the authorities and the courts after several years so that records may be weeded out and a student may say whatever he likes.

9. Accordingly, there is absolutely no error in the impugned order. Petitioner does not deserve grant of intermediate certificate. Writ Petition is therefore dismissed.

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**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 01.11.2012**

**BEFORE**
**THE HON'BLE SIBGHAT ULLAH KHAN, J.**

Civil Misc. Writ Petition No. 29795 of 2012

**U.P. Lekhpals Sangh, Branch Ballia, And Others ...Petitioner**
**Versus**
**State of U.P. and others ...Respondents**

**Counsel for the Petitioner:**
Sri Ashok Kumar Pandey

**Counsel for the Respondents:**
C.S.C.

**Constitution of India, Article 226-transfer-by common order about 254 Lekhpal transferred-from one tehsil to another-intra-district-shocking state of affairs most of them had worked more than 27 years-no interference called for-if they do not join within 9 week at transferred places-adverse entry be given-petition dismissed-approval from minister-obligatory.**

**Held: Para-4**

**This is very strange. From the transfer list dated 23.5.2012 it appears that the transferred lekhpals were working for several years in same Tehsils. Some were working for 28 years, some for 27 years, more than 40 transferred lekhpals were working for 17 years, about 40 were working for 16 years. No transferred lekhpal had worked at the Tehsil from where he was transferred for less than 10 years. This was a horrible state of affairs. They ought to have been**

**transferred earlier. In any case the requirement of seeking approval of minister for more than 15% lekhpals is merely directory. Accordingly, I do not find least error in the impugned transfer order.**

(Delivered by Hon'ble Sibghat Ullah Khan, J.)

1. Heard learned counsel for the petitioners and learned standing counsel for the respondents in both the writ petitions.

**First Writ Petition**

2. This writ petition has been filed by two petitioners.

3. Petitioner no.2 is General Secretary of petitioner no.1 Lekhpal's union. Out of 384 lekhpals working in different tehsils of District Ballia, 254 lekhpals have been transferred by the order dated 23.5.2012, Annexure 1 to the writ petition passed by Chief Revenue Officer, Ballia which has been challenged through this writ petition (para 6 of the writ petition). Court fees of Rs.27000/- and odd has been paid i.e. Rs.100/- for each transferred lekhpal. All the transfers are intra district in the sense that each of the affected lekhpals has been transferred from one Tehsil of Ballia to another Tehsil of Ballia. The main ground taken in the writ petition is that the transfer order is in the teeth of notification of the Election Commission dated 23.5.2012. The said notification was issued in respect of elections of local bodies. The said elections are over since long and the notification has been withdrawn.

4. The other ground is that 70% of lekhpals have been transferred without seeking approval of the minister concerned as required by transfer policy. The restriction of transfer of not more than 15% employees applies to transfer beyond districts. Lekhpals are normally not transferred beyond districts. In the instant case also no lekhpal has been transferred beyond district Ballia still petitioners are not satisfied. This is very strange. From the transfer list dated 23.5.2012 it appears that the transferred lekhpals were working for several years in same Tehsils. Some were working for 28 years, some for 27 years, more than 40 transferred lekhpals were working for 17 years, about 40 were working for 16 years. No transferred lekhpal had worked at the Tehsil from where he was transferred for less than 10 years. This was a horrible state of affairs. They ought to have been transferred earlier. In any case the requirement of seeking approval of minister for more than 15% lekhpals is merely directory. Accordingly, I do not find least error in the impugned transfer order.

5. Writ petition is dismissed.

6. If within a week transferred lekhpals do not join at the transferred place, adverse entries shall be made in their service records and if considered appropriate disciplinary proceedings may also be initiated.

**Second Writ petition**

7. This writ petition has also been filed by two lekhpals who have been transferred against the same order dated 23.5.2012 which was challenged through the earlier writ petition. Their names are at serial no.12 and 44 in the general transfer order dated 23.5.2012. In respect of those transferred lekhpals who were

working at Tehsil Sadar Ballia, consequent order was passed on 24.5.2012 relieving them including two petitioners. Transfer order and relieving order in this writ petition has also been challenged on the same grounds on which it was challenged in the earlier writ petition. This writ petition is also dismissed on the same grounds on which earlier writ petition has been dismissed. Petitioners should also join within a week otherwise adverse entries shall be made and disciplinary proceedings if considered necessary may also be initiated against them.

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**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: ALLAHABAD 19.112012**

**BEFORE**
**THE HON'BLE S.C. AGARWAL, J.**

Criminal Misc. Application No. 29911 of 2009

**Ajay Veer Singh and others**
**...Applicant**
**Versus**
**State Of U.P. and another**
**...Opposite Parties**

**Counsel for the Petitioner:**
Sri Arun Srivastava

**Counsel for the Respondents:**
A.G.A.

**Code of Criminal Procedure-Section 482-prayer to quash charge sheet offence under Section 498-A, 323, 504, 506 I.P.C.-matrimonial dispute-before mediation center-parties comes to terms of settlement-agreement executed-acted upon by joint settlement affidavit-considering divorce degree by mutual consent-purely personal in nature dispute-no possibility of prosecution success-charge sheet along with entire criminal proceeding quashed.**

**Held: Para-8**

**Considering the fact that the subject matter of the FIR, subsequent investigation, filing of the charge sheet submitted by the police are in relation to a matrimonial dispute between the applicants and opposite party no. 2 and the dispute now stands voluntarily, mutually and amicably settled between the parties vide Joint Settlement Affidavit dated 18.4.2010. I see no purpose in continuing the criminal proceedings arising out of FIR in question. Moreover the parties have also obtained a decree of divorce and all the disputes between them have come to an end by mutual consent. The dispute between the parties is of a purely personal nature. After compromise between the parties, keeping the matter alive with no possibility of a result in favour of the prosecution is a luxury for the Court.**

**Case Law discussed:**
(2008) 2 Supreme Court Cases (Cri.) 464

(Delivered by Hon'ble S.C. Agarwal, J.)

1. This is an application under Section 482 Cr.P.C. has been filed with a prayer to quash charge-sheet in Criminal Case No. 16470 of 2009, State Vs. Ajay Veer Singh & others, under Sections 498A, 323, 504, 506 IPC and  D.P. Act arising out of case crime no. 849 of 2009, P.S. Kavi Nagar, District-Ghaziabad.

2. Heard learned counsel for the applicants and learned AGA for the State.

3. The applicant no. 1 Ajay Veer Singh is the husband of opposite party no. 2. The applicants no. 2 to 6 are

mother, father, brother, sister and brother in-law of applicant no. 1. The opposite party no. 2 lodged FIR against the applicants alleging harassment on account of demand of dowry whereupon, investigation ensued and after investigation, the police submitted impugned charge-sheet against the applicants.

4. Since it was a matrimonial dispute, vide order dated 15.12.2009 passed by Ho'ble Sheo Kumar Singh, J, the matter was referred to Mediation and Reconciliation Centre of this Court. In proceedings before the mediation centre, parties came to terms and settlement-agreement was executed on 18.4.2010, which is on record.

5. Learned counsel for the applicants submitted that in pursuance of settlement-agreement, bank drafts for a sum of Rs. 9 lacs have been deposited in the Court of C.J.M., Ghaziabad through 11 bank drafts. A certified copy of the office report from the office of C.J.M. , Ghaziabad is annexure no. 1 to the supplementary affidavit dated 30.9.2010. Opposite party filed a petition under Section 13 of the Hindu Marriage Act before Civil Judge (Senior Division), Ghaziabad, which was allowed in accordance with the settlement-agreement executed before mediation centre of this Court and the marriage of applicant no. 1 and opposite party no. 2 was dissolved be a decree of divorce. A certified copy of the judgment in divorce petition no. 873 of 2010, Smt. Sophiya Vs. Ajay Veer Singh passed by the Civil Judge (Senior Division), Ghaziabad on 19.7.2010 is annexure no. 2 to the aforesaid supplementary affidavit. These documents shows that settlement-agreement executed before Mediation and Reconciliation Centre of this Court has been acted upon by the parties.

6. It was agreed between the parties through settlement-agreement that a sum of Rs. 9 lacs would be paid to opposite party no. 2 and they agreed to divorce by mutual consent. Clause-g of para 6 of the settlement-agreement is as follows :-

*"That let this settlement be placed before this Hon'ble Court who would pass appropriate order with regard to pending criminal proceedings before C.J.M., Ghaziabad bearing Crl. Case No. 1647 of 2009, u/s 498A, 323, 504, 506 IPC and D.P. Act, P.S. Kavi Nagar, Ghaziabad keeping in view that the parties have entered into a compromise and Ms. Sophia is now no more interested in pursuing the criminal proceedings against her husband Ajay Veer Singh only after she receives Rs. Nine lacs and decree of divorce is passed between them".*

7. Offence under Section 498A IPC and Section 3/4 D.P. Act are not compoundable. However, the Apex Court in case of Madan Mohan Abbot Vs. State of Punjab (2008) 2 Supreme Court Cases (Cri.) 464 observed as under :-

*"We need to emphasise that it is perhaps advisable that in disputes where the question involved is of a pure personal nature, the court should ordinarily accept the terms of the compromise even in criminal proceedings as keeping the matter alive with no possibility of a result in favour of the prosecution is a luxury which the courts, grossly overburdened as they are,*

*cannot afford and that the time so saved can be utilised in deciding more effective and meaningful litigation. This is a common sense approach to the matter based on ground of realities and bereft of the technicalities of the law".*

8. Considering the fact that the subject matter of the FIR, subsequent investigation, filing of the charge sheet submitted by the police are in relation to a matrimonial dispute between the applicants and opposite party no. 2 and the dispute now stands voluntarily, mutually and amicably settled between the parties vide Joint Settlement Affidavit dated 18.4.2010. I see no purpose in continuing the criminal proceedings arising out of FIR in question. Moreover the parties have also obtained a decree of divorce and all the disputes between them have come to an end by mutual consent. The dispute between the parties is of a purely personal nature. After compromise between the parties, keeping the matter alive with no possibility of a result in favour of the prosecution is a luxury for the Court.

9. I, therefore, allow the application. The impugned charge-sheet and entire proceedings in criminal case no.16470 of 2009, under Sections 498A, 323, 504, 506 IPC and D.P. Act , State Vs. Ajay Vir Singh & others, P.S. Kavi Nagar, pending in the Court of C.J.M. Ghaziabad are quashed and the matter stands finally resolved in terms of compromise.

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**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 08.10.2012**

**BEFORE**
**THE HON'BLE SUDHIR AGARWAL, J.**

Civil Misc. Writ Petition No.34603 of 2012

**Smt. Nisha Devi ...Petitioner**
**Versus**
**State of U.P. & Others ...Respondents**

**Counsel for the Petitioner:**
Sri Ashish Srivastava

**Counsel for the Respondents:**
C.S.C.

**Constitution of India, Article 226- cancellation of appointment as Anganwari Worker-G.O. Dated 16.12.03 relied-speaks the applicant should be permanent resident of-same village where-Anganwari Center running-admittedly petitioner belongs to another village of same Nyay Panchayat-no scope of alteration of mandatory conditions regarding same village-held-cancellation proper.**

**Held: Para-9**

**In the present case the Government order makes it very clear that the incumbent, who does not belong to same village in which the Anganbari Center is running, cannot be selected and appointed. It is not disputed that petitioner does not belong to the same village but the village to which petitioner is permanent resident is a part of Gram Panchayat which includes the village in which Anganbari Center is situated. That being so, once it is admitted that petitioner is not the permanent resident of village in which Anganbari Center is situated, in view of specific conditions contained in Government Order dated 16.12.2003, the impugned order cannot**

**be faulted and appointment of petitioner cannot be said to be valid.**

**Case Law discussed:**

JT 2006 (4) SC 531; 2007 (6) ADJ 272

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. This writ petition is directed against the order dated 29.05.2012 passed by District Magistrate, Kannauj cancelling selection of petitioner Anganbari Sahayika for Anganbari Centre Bhoramau, Gram Sabha Kalsan, Tehsil Tirwa, District Kannauj on the ground that she is not permanent resident of said village hence her selection and appointment would be in the teeth of Government Order dated 16.12.2003.

2. Learned counsel for the petitioner referred to the advertisement and said that in case the candidate of same village is not available, the candidate of Gram Panchayat of which the village in question is part can be considered.

3. Learned Standing Counsel, however, has filed counter affidavit placing on record the relevant Government order pursuant whereto the selection in question has been made, pointing out that the condition, that incumbent must belong to same village is mandatory. He refers to para 3(a), (b), (c), (d), (e) and (f) thereof and contended that there is no scope of alteration of condition that the incumbent must belong to same village otherwise the selection and appointment, even if made, would have to be cancelled.

4. The Government order goes to the extent that in case after selection and appointment the candidate has changed the village for any reason whatsoever, the appointment shall be cancelled.

5. In my view the submission of learned Standing Counsel has force. The relevant paragraphs of Government Order dated 16.12.2003 read as under:

*''(क) सर्वप्रथम अपेक्षित अर्हता रखने वाली उसी **गॉव** की निवासिनी विधवा महिला।*

*(ख) विधवा महिला उपलब्ध न होने की दशा में उसी **गॉव** की निवासिनी तलाकशुदा महिला।*

*(ग) विधवा तथा तलाकशुदा महिला के उपलब्ध न होने की दशा में गरीबी रेखा के नीचे जीवन यापन करने वाली महिलाओं में से। आय के सम्बन्ध में सम्बन्धित तहसीलदार का पमाण पत्र ही मान्य होगा।*

*(घ) यदि उपरोक्त में से कोई भी अभ्यर्थी उपलब्ध न हो तो गरीबी रेखा के ऊपर की अर्ह पात्र महिला को भी कार्यकत्री के पद पर चयन हेतु पात्र माना जायेगा। लेकिन उसी **गांव** की निवासी होना अनिवार्य है।*

*(ड़) यदि ऑगनबाडी केन्द्र खोले जाने वाले ग्राम में केवल एक ही विधवा, तलाकशुदा अथवा गरीबी रेखा से नीचे जीवन–यापन करने वाली महिला अपेक्षित अर्हता रखती है, तो उसको चयन समिति की संस्तुति पर मानदेय पर नियुक्त कर दिया जायेगा परन्तु यदि एक से अधिक विधवा, या एक से अधिक तलाकशुदा अथवा एक से अधिक गरीबी रेखा से नीचे जीवन–यापन करने वाली महिला पात्रता की श्रेणी में आती है, तो उसका चयन एक चयन समिति के माध्यम से किया जायेगा। चयन समिति द्वारा कोई साक्षात्कार नहीं किलया जायेगा केवल पात्र महिलाओं द्वारा हाईस्कूल तथा उससे उच्च शिक्षा प्राप्त अभ्यर्थी की श्रेणी के आधार पर निर्धारित अंक का योग करके मेरिट लिस्ट बनायी जायेगी।*

*हाईसकूल, प्रथम श्रेणी में उत्तीर्ण महिला को 03 अंक, द्वितीय श्रेणी में उत्तीर्ण महिला को 02 अंक तथा तृतीय रेणी में उत्तीर्ण महिला को 01 अंक, प्रदान किया जायेगा। इसी प्रकार इण्टरमीडियट की परीक्षा प्रथम श्रेणी में उत्तीर्ण होने पर 03 अंक, द्वितीय श्रेणी में उत्तीर्ण होने पर 02 अंक व तृतीय श्रेणी में उत्तीर्ण होने पर 01 अंक, प्रदान किया जायेगा। इससे अधिक शैक्षिक योग्यता रखने वाली महिला को अतिरिक्त अंक नहीं दिये जायेंगे। समस्त परीक्षाओं के अंक जोडने के पश्चात मेरिट लिस्ट तैयार की जायेगी। यदि एक से अधिक अभ्यर्थी समान अंक प्राप्त करते हैं तो वरीयता अधिक आयु वाले अभ्यर्थी को दी जायेगी। यदि एक से अधिक अभ्यर्थी के अंक व आयु भी समान हैं तो अधिक*

*शैक्षिक योग्यता रखने वाले अभ्यर्थी को वरीयता दी जायेगी।*

*(च) आंगनबाडी कार्यकत्रियों एवं सहायिकाओं के लिए यह अनिवार्य होगा कि वह उसी आंगनबाड़ी क्षेत्र की निवासनी हों। वहां का स्थायी निवासी होने के सम्बन्ध में तहसीलदार या ग्राम प्रधान से प्राप्त प्रमाण पत्र प्रस्तुत करना अनिवार्य होगा। यदि कोई कार्यकर्त्री या सहायिका चयन के बाद ग्राम छोड़ देती है या किसी अन्य गॉव में निवास करने लगती है या शादी होने की स्थिति में अन्यत्र रहने लगती है तो मानदेय सेवा समाप्त कर दी जायेगी।''*

*(a) First of all, a widowed woman, resident of the same **village**, having the requisite qualification.*

*(b) In case of non-availability of a widowed woman, a divorced woman who is a resident of the same **village.***

*(c) In case of non-availability of a widowed and divorced woman, from amongst women living below poverty line. In respect of income, a certificate given by the concerned Tahsildar will only be accepted.*

*(d) If , from amongst the aforesaid, no candidate is available, any qualified woman above poverty line will also be considered eligible for selection to the post of karyakatri. However, she must be a resident of the same **village.***

*(e) If, in a village where Anganwadi Kendra is to be opened, there is only one widowed or divorced or BPL woman having the requisite qualification, she will be appointed on remuneration upon the recommendation of selection committee. But if more than one widowed or divorced or BPL woman come within the eligibility zone, the selection will be done through selection committee. No interview will be held by selection committee. Merit list will be drawn up by totalling the prescribed marks on the basis of the division secured by the eligible women in High School and in course of higher education.*

*03 marks will be awarded to a woman on passing High School in the first division, 02 marks to a woman on passing it in the second division and 01 mark to a woman on passing it in the third division. In this very manner, 03 marks will be awarded on passing Intermediate examination in the first division, 02 marks on passing it in the second division and 01 mark on passing it in the third division. Extra marks will not be awarded to a woman having higher educational qualification. Merit list will be prepared after totalling marks of all the examinations. If more than one candidate get equal marks, priority will be given to a candidate older in age. If more than one candidate are at par with one another in respect of marks and age as well, priority will be given to a candidate having better educational qualification.*

*(f) It will be mandatory for Anganwadi Karyakatris and attendants to be residents of the same anganwadi area. As regards claim for being a permanent resident of that place, it will be necessary to present a certificate obtained from Tahsildar or Gram Pradhan. If a Karyakatri or attendant leaves her village after selection or begins to reside in some other village or begins to reside somewhere else in the event of marriage, her service on remuneration shall be terminated." (English Translation by the Court)*

6. The very opening part of Government order shows that it is in supercession of all earlier Government

Orders, therefore, the procedure and conditions prescribed in Government Order dated 16.12.2003 have to be followed for making selection and appointment as Angan Bari Karyakatri and/or Attendant. A combined reading of the aforesaid paragraphs of Government Order dated 16.12.2003 make it very clear that the incumbent must belong to the same village and there is no scope of expanding it to the Village Panchayat of which the concerned village is a part. The insistence on the part of learned counsel for the petitioner on the advertisement, cannot be accepted in view of the fact that selection and appointment has to be made in accordance with relevant Government order which prescribes the condition for selection and appointment and pursuant whereto recruitment process has been started.

7. It is well settled that in case of discrepancy between relevant provision under which selection is made and conditions actually advertised in the advertisement, it is the relevant provision which shall prevail and not the advertisement since advertisement is consequential and dependent upon the relevant provisions pursuant whereto it has been issued. In **Malik Mazhar Sultan Vs. U.P.P.S.C., JT 2006 (4) SC 531** the Apex Court has said:

*"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."*

*(emphasis added)*

8. Same view has been taken by a Division Bench of this Court S**anjay Agarwal Vs. State of U.P. and others, 2007(6) ADJ 272.**

9. In the present case the Government order makes it very clear that the incumbent, who does not belong to same village in which the Anganbari Center is running, cannot be selected and appointed. It is not disputed that petitioner does not belong to the same village but the village to which petitioner is permanent resident is a part of Gram Panchayat which includes the village in which Anganbari Center is situated. That being so, once it is admitted that petitioner is not the permanent resident of village in which Anganbari Center is situated, in view of specific conditions contained in Government Order dated 16.12.2003, the impugned order cannot be faulted and appointment of petitioner cannot be said to be valid.

10. I, therefore, find no merit in the writ petition.

11. Dismissed.

12. Interim order, if any, stands vacated.

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**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 17.09.2012**

**BEFORE**
**THE HON'BLE AMRESHWAR PRATAP SAHI, J.**

Civil Misc. Writ Petition No. 46244 of 2012

**Vivekanand Pathak ...Petitioner**
**Versus**
**Union of India Thru Secy. and others ...Respondents**

**Counsel for the Petitioner:**
Sri Jitendra Kumar
Sri Abhishek Rai

**Counsel for the Respondents:**
A.S.G.I.
Sri Ram Gopal Tripathi
Sri A.K. Goyal
Sri Kasif Zaidi

**Constitution of India, Article 226-Disqualification to contest-Student's Union Election-as per para 1 of Code of Election 2012-upper age limit 25 years fixed-on last date of submission of nomination form-petitioner is more than 25 years-argument that as per guidelines of Apex Court election be held with 6 to 8 weeks of commencement of academic session-if election held in start of July 2011-petitioner was eligible to contest-held-election to be held as per cut of date-it can not be ultra vires-in any way-petition dismissed.**

**Held: Para-9**

**Apart from this, the Court has to apply the golden rule of construction and has to construe all the provisions read together. They cannot be read in isolation to each other. The elections have to be held through a process and therefore there has to be a cut off date for the purpose of computing the age of a candidate. It cannot be an ongoing or a never ending process, Accordingly, the cut off date as provided, that is the last date of nomination, does not in any way appear to be ultra vires either the provisions of the regulations, or the judgment of the apex court, as relied upon by the learned counsel for the petitioner.**

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.)

1. Heard learned counsel for the petitioner, Sri Abhishek Rai and Sri A.K. Goyal for the respondent Nos. 2, 3 and 4, and Sri Kasif Zaidi for the respondent No. 1.

2. The respondent University is a Central University. Regulations for the conduct of Students' Union Election known as the Code of Election 2012 have been framed. The petitioner has come up assailing the action of the University as also challenging Paragraph 1 of the eligibility criteria of the said Code which prescribes the cut off date for computing the age of a contestant. The said provision clearly indicates that the age of a candidate has to be computed on the date of filing of the nomination. Admittedly the last date for nominations according to the University is 24th September, 2012. The petitioner has also admittedly become 25 years of age on 11th July, 2012 and is a postgraduate student. Accordingly, the petitioner becomes disqualified for contesting the elections as on the date of nomination he would be above 25 years of age.

3. To advance his submissions, learned counsel for the petitioner takes the help of Guidelines No. 6.4.2 that has been adopted by the apex court in the case of **University of Kerala Vs. Council, Principles, Colleges Kerala and others,**

**(2008) 8 SCC 304** to contend that elections have to be held within 6 to 8 weeks of the date of commencement of the Academic Session.

4. Learned counsel submits that the Academic Session of the petitioner had already commenced in July, 2011 and had the elections been held within 6 to 8 weeks of such session, the petitioner would have been entitled to contest the elections. It is the delay in the holding of the elections that has resulted in the disqualification of the petitioner and therefore by way of a necessary fiction the petitioner's claim to contest the election even after crossing the age of 25 years should be construed to be within the eligibility zone as defined therein.

5. Learned counsel therefore submits that the provision of specifying the cut off date is contrary to the aforesaid view expressed by the apex court in relation to the holding of elections within the same Academic Session.

6. Learned counsel for the University contends that the same judgment also makes a provision for fixing the upper age limit and prescribing the rules for computing the age of candidates in paragraph 6.5 of the judgment. He further contends that the University after due deliberations has made a provision that the last date of nomination should be the cut off date. He therefore contends that there being no contradiction, the University is entitled to fix a date as such the contention raised on behalf of the petitioner cannot be accepted.

7. Sri Goyal further contends that merely because the University had not got the Students' Union Elections held for the Session 2011-12, the same cannot be a ground to strike down the provision of the cut off date, and if the petitioner was claiming any such right, he could have claimed it during the same session not after the expiry of the session.

8. Having heard learned counsel for the parties and having considered the aforesaid provisions, the facts are admitted on record including the fact that the elections were not held in the previous session. In my opinion, if the petitioner wanted to assert his rights to contest an election, it was open to him to have approached the appropriate forum for the holding of the elections. Merely because the elections have not been held in the same Academic Session, does not in any way provide a ground to declare the cut off date as ultra vires, inasmuch as, the said cut off date was very much relevant even for the previous session.

9. Apart from this, the Court has to apply the golden rule of construction and has to construe all the provisions read together. They cannot be read in isolation to each other. The elections have to be held through a process and therefore there has to be a cut off date for the purpose of computing the age of a candidate. It cannot be an ongoing or a never ending process, Accordingly, the cut off date as provided, that is the last date of nomination, does not in any way appear to be ultra vires either the provisions of the regulations, or the judgment of the apex court, as relied upon by the learned counsel for the petitioner.

10. In the aforesaid circumstances, the argument advanced that merely because the elections were not held in the

previous year gives a right to the petitioner by way of a fiction to contest elections even after the expiry of the term, cannot be accepted. The argument is too far fetched.

11. The writ petition lacks merit and is hereby dismissed.

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**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 12.10.2012**

**BEFORE**
**THE HON'BLE ASHOK BHUSHAN, J.**
**THE HON'BLE MRS. SUNITA AGARWAL, J.**

Civil Misc. Writ Petition No. 48461 of 2012

**M/S Neelam Restorant ...Petitioner**
**Versus**
**State of U.P. Thru Secy. and others ...Respondents**

**Counsel for the Petitioner:**
Sri Mukesh Kumar

**Counsel for the Respondents:**
C.S.C.

**Child Labor (Prohibition & Regulation) Act 1986-Section 3-Labor Enforcement Officer/Inspector-found children about 13 years working-following the direction of M.C. Mehta Case directed to deposit Rs. 20,000-on each child-argument that Trial still going on and the petitioner-granted bail-if got fair acquittal-such direction worthless-held-on acquittal-request for refund open-no ground for quashing the impugned order.**

**Held: Para-19**

**In the present case, the complaint has already been filed and the same is pending. In the event the outcome of the complaint is that there was no violation of the provisions of Section 3 of the 1986 Act by the employer, the employer can always request the Inspector to refund the amount already realised. The basis for realisation of amount of Rs.20,000/- is an act of offending employer which is in contravention of the provisions of the 1986 Act. In the event it is found by the Magistrate trying the complaint that there was no contravention of the provisions of Section 3 of the 1986 Act by the employer, the employer from whom the amount has been recovered, can always request for refund of the same.**

**Case Law discussed:**
(1996) 6 SCC 756; (2006) 9 SCC 225

(Delivered by Hon'ble Ashok Bhushan, J.)

1. Heard Sri Mukesh Kumar, learned counsel for the petitioner and Smt. Archana Srivastava, learned Standing Counsel appearing for the State-respondents.

2. In pursuance of the order dated 20th September, 2012, learned Standing Counsel has obtained instructions and by consent of the learned counsel for the parties, the writ petition is being finally decided.

3. By this writ petition, the petitioner has prayed for quashing the citation dated 30th July, 2012 issued to the petitioner for recovery of an amount of Rs.20,000/- on account of engagement of child labour.

4. On 16th June, 2010 the Labour Enforcement Officer/Inspector conducted a survey of petitioner's restaurant at 9.35 A.M. in which survey a child labour, namely, Shani Kumar son of Arman Singh aged 13 years was found to be engaged in contravention of Section 3 of the Child Labour (Prohibition and Regulation) Act, 1986 (hereinafter referred to as the 1986 Act). A complaint dated 27th April, 2011 was filed by the said Labour Enforcement Officer/Inspector under the 1986 Act before

the Chief Judicial Magistrate, Farrukhabad. The complaint filed by the Labour Enforcement Officer/Inspector is pending consideration before the Chief Judicial Magistrate.

5. Learned counsel for the petitioner, challenging the citation dated 30th July, 2012, contends that the allegation that a child labour was found engaged in petitioner's concern is incorrect. It is stated that at the time of inspection the alleged child labour Shani Kumar son of Arman Singh, who was about 13 years of age, was taking food. He further contends that in the complaint the petitioner appeared and was granted bail. It is submitted that recovery proceeding cannot be initiated since the complaint for trial under Section 3 of the 1986 Act is still pending in the Court of Chief Judicial Magistrate.

6. Learned Standing Counsel, after obtaining instructions from the respondents, submits that the recovery of Rs.20,000/- has been initiated against the petitioner in pursuance of the directions issued by the Apex Court in the case of ***M.C. Mehta vs. State of Tamil Nadu and others*** reported in (1996)6 SCC 756, decided on 10th December, 1996. She submits that State Government has also issued a Government order dated 5th June, 1998 in compliance of the above judgment of the Apex Court dated 10th September, 1996. It is further submitted that recovery can be initiated on contravention of provisions of the 1986 Act by the petitioner and the fact that complaint is pending before the Chief Judicial Magistrate does not preclude the respondents in initiating the proceeding for recovery.

7. We have considered the submissions of learned counsel for the parties and perused the record.

8. The Child Labour (Prohibition and Regulation) Act, 1986 has been enacted to prohibit the engagement of children in certain employments and to regulate the conditions of work of children in certain other employments. Section 3 of the 1986 Act contains provisions of prohibition of employment of children in certain occupations and processes. Section 3 of the 1986 Act is quoted below:-

***"3. PROHIBITION OF EMPLOYMENT OF CHILDREN IN CERTAIN OCCUPATIONS AND PROCESSES.*** *- No child shall be employed or permitted to work in any of the occupations set forth in Part A of the Schedule or in any workshop wherein any of the processes set forth in Part B of the Schedule is carried on : Provided that nothing in this section shall apply to any workshop wherein any process is carried on by the occupier with the aid of his family or to any school established by, or receiving assistance or recognition from, Government."*

9. In Part-A of the Schedule to the 1986 Act, list of occupations has been given in which at Item No.15 employment of children in dhabas (road side eateries), restaurants etc. is prohibited. Item No.15 of the Part-A of the Schedule to the 1986 Act is quoted below:-

*"**15.** Employment of children in dhabas (road side eateries), restaurants, hotels, motels, tea shops, resorts, spas or other recreational centres."*

10. Section 14 of the 1986 Act relates to penalties. Section 14 of the 1986 Act is quoted below:-

*"**14. PENALTIES.-** (1) Whoever employs any child or permits any child to work in contravention of the provisions of Sec. 3 shall be punishable with imprisonment for a term which shall not be less than, three months but which may extend to one year or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or with both.*

*(2) Whoever, having been convicted of an offence under Sec. 3, commits a like offence afterwards, he shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years.*

*(3) Whoever -*

*(a) fails to give notice as required by Sec. 9, or*

*(b) fails to maintain a register as required by Sec. 11 or makes any false entry in any such register; or*

*(c) fails to display a notice containing an abstract of Sec. 3 and this section as required by Sec. 12; or*

*(d) fails to comply with or contravenes any other provisions of this Act or the rules made there under,*

*shall be punishable with simple imprisonment which may extend to one month or with fine which may extend to ten thousand rupees or with both."*

11. Section 16 of the 1986 Act relates to procedure relating to offences and Section 17 of the 1986 Act provides for appointment of Inspectors. Sections 16 and 17 of the 1986 Act are quoted below:-

*"**16. PROCEDURE RELATING TO OFFENCES.** -- (1) Any person, police officer or inspector may file a complaint of the commission of an offence under this Act in any Court of competent jurisdiction.*

*(2) Every certificate as to the age of a child which has been granted by a prescribed medical authority shall, for the purposes of this Act, be conclusive evidence as to the age of the child to whom it relates.*

*(3) No Court inferior to that of a Metropolitan Magistrate or a Magistrate of the first class shall try any offence under this Act."*

***17. APPOINTMENT OF INSPECTORS.** - The appropriate Government may appoint inspectors for the purposes of securing compliance with the provisions of this Act and any inspector so appointed shall be deemed to be a public servant within the meaning of the Indian Penal Code (45 of 1860)."*

12. In a two Judge judgment of the Apex Court in the case of ***Anant Construction Co. vs. Govt. Labour Officer & Inspector*** reported in (2006)9 SCC 225, the Inspector after conducting survey had directed the employer to pay compensation, the said action of the Inspector was held to be beyond his jurisdiction. It was held that the jurisdiction of the Inspector does not extend to trying of the complaint.

13. A Public Interest Litigation in Writ Petition (C) No.465 of 1986 has already been entertained by the Apex Court suo motu on account of an unfortunate incident in one of the Shivakashi Crackers Company at Tamil Nadu where 39 persons died. The three Judge Bench passed an order in the aforesaid public interest litigation on 10th December,

1996, after obtaining report of the Committee. The Apex Court in the aforesaid judgment considered relevant constitutional provisions pertaining to prohibition of child labour i.e. Articles 24, 39(e), 39(f), 41, 45 and 47 of the Constitution. Article 24 of the Constitution of quoted below:-

*"**24. Prohibition of employment of children in factories, etc.**- No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.*

14. The Apex Court noted in the judgment that in respect of child labour punishment up to one year and fine of Rs.20,000/- has been provided in the 1986 Act, however, the said provisions are not effective instruments for removal of children working in industry. It is useful to quote paragraphs 26, 27 and 29 of the said judgment:-

*"**26.** Section 14 of the Act has provided for punishment upto 1 year (minimum being 3 months) or with find upto Rs.20,000/- (minimum being ten thousand) or with both, to one who employs or permits any child to work in contravention of provisions in section 3. Even so, it is common experience that child labour continues to be employed. As to why this has happened despite the Act of 1986, has come to be discussed by Neera Burra, in her afore- mentioned book at pages 246 to 230 o the 1995 edition. It has been first pointed out that the occupations and processes dealt by the Act are same about which the replealed statute (Employment of Children Act, 1938) had mentioned, except that in Part B, one process has been added- the same being "building and construction industry". According to Neera, there are a number of loopholes in the Act which has made it "completely ineffective instrument for the removal of children working in industry". One of the clear loopholes mentioned is that children can continue to work if they are a part of family of labour. It is not necessary for our purpose to go into other infirmities pointed out. Nonetheless, it deserves to be pointed out that the Act does not use the word "hazardous" anywhere, the implication of which is the children may continue to work in those processes not involving chemicals. Neera has tried to show how impracticable and unrealistic it is to draw a distinction between hazardous and non-hazardous processes in a particular industry. The suggestion given is that what is required is to list the whole industry as banned for child labour, which would make the task of enforcement simpler and strategies of evasion more difficult. Failure : causes*

***27**. We have, therefore, to see as to why is it that child labour has continued despite the aforesaid statutory enactments. This has been a subject of study by a good number of authors. It would be enough to note what has been pointed out in "Indian Child Labour" by Dr. J.C. Kulshreshtha. This aspect has been dealt in Chapter II. According to the author, the causes of failure are : (1) poverty; (2) low wages of the adult; (3) unemployment; (4) absence of schemes for family allowance; (5) migration to urban areas; (6) large families; (7) children being cheaply available; (8) non-existence of provisions for compulsory education; (9) illiteracy and ignorance of parents; and (10) traditional attitudes. Nazir Ahmad Shah has also expressed similar views in his book "Child Labour in India". In the article at pages 65 to 68 of 1993(3) SCJ (Journal Section) titled "Causes of the exploitation of child labour in India", Dr. Amar Singh and Raghuvinder Singh, who are attached to*

*Himachal Pradesh University, have taken the same views.*

.....

***29.*** *It may be that the problem would be taken care of to some extent by insisting on compulsory education. Indeed, Neera thinks that if there is at all a blueprint for tackling the problem of child labour, it is education. Even if it were to be so, the child of a poor parent would not receive education, if per force it has to earn to make the family meet both the ends. therefore, unless the family is assured of income allude, problem of child labour would hardly get solved; and it is this vital question which has remained almost unattended. We are, however, of the view that till an alternative income is assured to the family, the question of abolition of child labour would really remain a will-o'-the wisp. Now, if employment of child below that age of 14 is a constitutional indication insofar as work in any factory or mine or engagement in other hazardous work, and if it has to be seen that all children are given education till the age of 14 years in view of this being a fundamental right now, and if the wish embodied in Article 39(e) that the tender age of children is not abused and citizens are not forced by economic necessity to enter avocation unsuited to their age, and if children are to be given opportunities and facilities to develop in a healthy manner and childhood is to be protected against exploitation as visualised by Article 39(f), it seems to us that the least we ought to do is see to the fulfillment of legislative intendment behind enactment of the Child Labour (Prohibition and Regulation) Act, 1986. Taking guidance therefrom, we are of the view that the offending employer must be asked to pay compensation for every child employed in contravention of the provisions of the Act a sum of Rs.20,000/-; and the Inspectors, whose appointment is visualised by section 17 to secure compliance with the provisions of the Act, should do this job. The inspectors appointed under section 17 would see that for each child employed in violation of the provisions of the Act, the concerned employer pays Rs.20,000/- which sum could be deposited in a fund to be known as Child Labour Rehabilitation-cum-Welfare Fund. The liability of the employer would not cease even if he would desire to disengage the child presently employed. It would perhaps be appropriate to have such a fund district wise or area wise. The fund so generated shall form corpus whose income shall be used only for the concerned child. The quantum could be the income earned on the corpus deposited qua the child. To generate greater income, fund can be deposited in high yielding scheme of any nationalised bank or other public body."*

15. The Apex Court, as noted above, in paragraph 29 of the judgment has held, "Taking guidance thereform, we are of the view that offending employer must be asked to pay compensation for every child employed in contravention of the provisions of the Act a sum of Rs.20,000; and the Inspectors, whose appointment is visualised by Section 17 to secure compliance with the provisions of the Act, should do this job. The Inspectors appointed under Section 17 would see that for each child employed in violation of the provisions of the Act, the employer concerned pays Rs.20,000 which sum could be deposited in a fund to be known as Child Labour Rehabilitation-cum-Welfare Fund".

16. The ultimate directions were issued in paragraphs 33(7) and 33(9) of the judgment, which are quoted below:-

*"**33(7)** A district could be the unit of collection so that the executive head of the*

*district keeps a watchful eve on the work of the Inspectors. Further, in view of the magnitude of the task, a separate cell in the Labour Department of the appropriate Government would be created. Monitoring of the scheme would also be necessary and the Secretary of the Department could perhaps do this work. Overall monitoring by the Ministry of Labour. Government of India, would be beneficial and worthwhile.*

.....

***33(9).*** *We should also like to observe that on the directions given being carried out, penal provision contained in the aforenoted 1936 Act would be used where employment of a child labour, prohibited by the Act, would be found."*

17. The three Judge Bench in ***M.C. Mehta's*** case (supra) thus had issued directions for realisation of compensation from the employer on contravention of provisions of Section 3 of the 1986 Act. The said directions are in addition to penal provisions which can also be enforced as is clear from the directions in paragraph 33(9) of the judgment. The aforesaid judgment thus clearly indicates that realisation of compensation from employer on contravention of Section 3 of the 1986 Act is not to wait till complaint filed for penalty is decided by the competent Court. The Inspectors, who have been appointed under Section 17 of the 1986 Act, have been entrusted with the duties of enforcement of the 1986 Act and realise compensation from employer who employ any child below the age of 14 years in any occupation as mentioned in Part-A of the Schedule or in any of the processes as mentioned in Part-B.

18. In the present case, the petitioner himself has brought on the record copy of the complaint which indicates that Inspector on survey made on 11th June, 2010 found a child labour of 13 years aged working. The directions of the Apex Court in M.C. Mehta's case (supra), which directions are referable to Article 141 of the Constitution of India, have rightly been followed by the Inspector. Learned Standing Counsel has also referred to a Government order dated 5th June, 1998, which has been placed by the learned Standing Counsel for perusal of the Court, by which the State Government has issued direction in compliance of the directions of the Apex Court in ***M.C. Mehta's*** case (supra) for recovery of Rs.20,000/- from the guilty employer as arrears of land revenue. Thus the citation to recover Rs.20,000/- as arrears of land revenue on the basis of survey made by the Inspector on 11th June, 2010 is clearly justified. We do not find any error in the citation which may warrant interference by this Court in exercise of writ jurisdiction. However, it is necessary to observe that the recovery of Rs.20,000/- on the ground of violation of Section 3 of the 1986 Act on the basis of survey shall always be subject to decision on the complaint if the same is filed by the Inspector on the basis of survey report.

19. In the present case, the complaint has already been filed and the same is pending. In the event the outcome of the complaint is that there was no violation of the provisions of Section 3 of the 1986 Act by the employer, the employer can always request the Inspector to refund the amount already realised. The basis for realisation of amount of Rs.20,000/- is an act of offending employer which is in contravention of the provisions of the 1986 Act. In the event it is found by the Magistrate trying the complaint that there was no contravention of the provisions of Section 3 of the 1986 Act by the employer, the employer from whom the

amount has been recovered, can always request for refund of the same.

20. In result, the prayer of the petitioner for quashing the citation dated 30th July, 2012 cannot be accepted and is refused. However, it shall be open for the petitioner to seek refund of the amount in the event it is held in the complaint filed against him that no offence is committed by the employer under Section 3 of the 1986 Act.

21. Subject to above, the writ petition is dismissed.

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**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 08.11.2012**

**BEFORE**
**THE HON'BLE SUNIL AMBWANI, J.**
**THE HON'BLE ADITYA NATH MITTAL, J.**

Civil Misc. Writ Petition No. 50928 of 2012

**Smt. Punam Singh ...Petitioner**
**Versus**
**State of U.P .and another ...Respondents**

**Counsel for the Petitioner:**
Mrs. Arti Raje
Sri R.N. Singh

**Counsel for the Respondents:**
C.S.C.

**Regulation of Coaching Act 2002-Section 3-Restrictions on running coaching-petitioner running coaching duly registered-list of teachers not supplies in registration form-petitioner's husband teaching as ad-hoc teacher in local college-submission that under section 2 K of U.P. Higher Education (Group-A) Service Rules 1985-hence restriction by D.I.O.S. Uncalled for-held-contract/ad-hoc teachers getting salary from public exchequer-are within purview of Act-to avoid ambiguity-Govt. To issue necessary notification to avoid defect the very purpose of the Act-petition dismissed.**

**Held: Para-9 and 10**

**The entire object and purpose of the Act would be defeated, if the court accepts the submission of the petitioner for exempting the adhoc, part-time or contract teachers appointed in the Government Schools and Colleges and are getting salary/remuneration from public exchequer the purview of the Act, and to permit them to teach in the coaching institutions.**

**For the aforesaid reasons, we do not find any force in the submission of the learned counsel for the petitioner that the contract/ad hoc teachers are not included within the meaning teachers under Section 2 (K) of the U.P. Regulation of Coaching Act 2002. The writ petition is dismissed.**

(Delivered by Hon'ble Sunil Ambwani,J.)

1. We have heard Sri R.N. Singh holding brief for the counsel for the petitioner. Learned standing counsel appears for the State respondents.

2. On 15.10.2012, we passed the following order:-

"List has been revised. No one appears for the petitioner.

It is alleged that the petitioner is running coaching institute by the name of Krishna Coaching Institute in which her husband is also teaching. She has prayed for writ of mandamus restraining the District Inspector of Schools, Karvi, Chitrakoot not to harass the petitioner for imparting coaching and establishing the coaching centre.

The averments in the writ petition would show that the respondent no.2 has objection on running the coaching institute under Section 7 of the U.P. Regulation of Coaching Act, 2002 on the ground that the petitioner's husband is a teacher within the meaning of Section 2 (K) of the Act.

In para 15 it is stated that the respondent and his employees are harassing the petitioner on the ground that her husband is imparting education in violation and in contravention of the Act, since the day the petitioner has applied for registration of the coaching centre.

The petitioner admits in para 5 that her husband is a contract teacher in Goswami Govt. Degree College Karvi appointed on 8.8.2005 on contract amount of Rs.8000/- per month. It is alleged that the contract teachers are not included within the definition of Section 2 (K) of the Act. The petitioner has not given her qualification and has not stated that anyone else is engaged for teaching in the coaching institute. In paragraph 10 of the writ petition it is stated that Rule 3 (h) of the Service Rules applicable to U.P. Higher Education (Group A) Service Rules, 1985 means a person, who is substantively appointed and since the petitioner's husband is a teacher appointed on contract, the restriction under the U.P. Regulation of Coaching Act, 2002 did not apply to him.

The object and purpose of registration of the coaching institute and in restraining the teachers teaching in the schools and colleges in coaching institute to curb the menace of the coaching, by the teachers, who are not teaching in the educational institutions, and are persuading the students to attend the coaching classes vitiating the entire atmosphere of schools and colleges.

We are unable to agree with the contention in the writ petition that the teachers appointed on contract, will not be included within the meaning of teachers under the Act.

Further we may observe that this writ petition has not been filed by the petitioner's husband, who can be said to be the person aggrieved to file the writ petition to claim the prayers.

After the order was dictated, a mention has been made that Smt. Arti Raje has not come to the Court as her mother has expired.

On the request made on her behalf, put up on 29.10.2012 in the additional cause list."

3. It is submitted that the petitioner is running a coaching institution, which is registered under Section 3 of U.P. Regulation of Coaching Act, 2002 (in short the Act). The list of teachers as required under the Act who will be teaching in the coaching institution, is not given either in the application for registration or in the pleading in the writ petition.

4. Sri R.N. Singh, relying on the judgment of the Court in XL-IIT Forum and others Vs. State of U.P. and others in writ petition No. 34022 of 2002, decided on 27.05.2003, upholding the validity of the Act, submits that since the petitioner's husband has not been regularly appointed, there is no

prohibition under the Act for him to teach in the coaching classes run by the petitioner. It is submitted that the petitioner's husband was appointed as a teacher vide order dated 8.8.2005 of the Joint Director of Education (Higher), Allahabad to teach Biology in Government Degree College, Karvi, District Chitrakoot. He is still serving as a teacher on contact, and is not in regular appointment.

5. Sri R.N. Singh submits that the definition of teacher under Section 2 (K) of the Act includes only regular teacher, and not teachers appointed on contract. The petitioner's husband does not have permanent employment and since there is no bar under the Act for the teachers appointed on the contract to teach in the coaching institution, the action of respondent in harassing the petitioner and restraining her husband from teaching in the coaching institution is illegal and arbitrary. The petitioner has prayed for a direction that the District Inspector of Schools and its employees be restrained from harassing the petitioner for imparting coaching and establishing coaching centre, as prayed in her representation dated 22.09.2012.

6. Sri R.N. Singh has relied on the observation made by the Court in XL-IIT Forum and others (Supra), which has been quoted as below:-

"In paragraph 3(a) of the counter affidavit it is stated that coaching classes are being run in almost all the cities in the State and complaints are often made that the full time teachers drawing salary from the State Exchequer not only avoid proper teaching in the college but promote, some times force, the students to attend these coaching classes. Instead of attending classes in the institutions the teachers preferred to attend the coaching even during college hours and students are exploited thereby. As stated in Annexure 1 to the counter affidavit, while such teachers take salary from the State Exchequer, they encourage the students to join their coaching classes, and only those who join the coaching get good marks. Often the teachers do not teach in the institutions but only teach in the coaching centres although they take salary from the institutions. The students are often compelled to join the coaching, which results in their economic exploitation.

xxx xxx xxx

Further it must be borne in mind that there is no absolute prohibition on running coaching institutions under the impugned statutes. There is simply a regulation and restriction to a limited extent designed to serve a largely public interest, namely, to ensure that the teachers employed in the colleges and universities on the regular side devote all their attentions to their respective colleges and universities where they are supposed to be serving instead of devoting their time and attention to the business of teaching in coaching institutes. That being so we find no substance in the challenge to the statutes.

xxx xxx xxx

In our opinion the impugned Act would also serve a good purpose by giving employment to a large number of educated people who are unemployed, since full time teachers are prohibited from doing coaching. Thus the educated

unemployed persons will have more chance of getting jobs in the coaching centers / coaching institutions. This will also help in bringing down unemployment among educated unemployed people, and also give employment to retired teachers."

7. In XL-IIT Forum and others (Supra), this Court upheld the constitutional validity of the U.P. Regulation of Coaching Act 2002. The Court considered the aims and object of education and lauded the purpose, for which the Act was enacted. It was held that the coaching has became menace, and the teachers, inspite of appointed on full time to teach in the colleges and drawing salary from the public exchequer, do not perform their duties. They insist upon the students to attend the coaching classes, where they teach either the same students, or students of some other colleges, who have suffered at the hands of substandard teaching by other such teachers.

8. The definition of teachers under the Act does not restrict its meaning only to those regular teachers, who are not appointed permanently nor confining only those teachers who are drawing salary from public exchequer.There may be variety of circumstances in which regular selection may be delayed, and one of these may be repeated representations, writ petitions filed by teachers appointed on ad hoc basis or on contract, to regularize them.These teachers are required to take classes as the regular teachers, and are now paid almost at par with the regular teachers. The Government has also framed schemes from time to time to regularize these teachers, who hold the minimum qualification and were eligible at the time of appointment.

9. The entire object and purpose of the Act would be defeated, if the court accepts the submission of the petitioner for exempting the adhoc, part-time or contract teachers appointed in the Government Schools and Colleges and are getting salary/remuneration from public exchequer the purview of the Act, and to permit them to teach in the coaching institutions.

10. For the aforesaid reasons, we do not find any force in the submission of the learned counsel for the petitioner that the contract/ad hoc teachers are not included within the meaning teachers under Section 2 (K) of the U.P. Regulation of Coaching Act 2002. The writ petition is **dismissed.**

11. We may, however, observe that the State Government may issue a notification in this regard, so that there may not be any ambiguity in the interpretation of the Act under which the teachers appointed on ad hoc/ contract/honorarium basis may start/teach in the coaching institution, to defeat the very purpose and object of the Act.

12. Let a copy of this order be supplied to the learned Chief Standing Counsel for its communication to the State Government.

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**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 06.11.2012**

**BEFORE**
**THE HON'BLE TARUN AGARWALA, J.**

Civil Misc. Writ Petition No. 51624 of 2012

**Pramod Kumar ...Petitioner**
**Versus**
**State of U.P. and others ...Respondents**

**Counsel for the Petitioner:**
Sri Narendra Mohan

**Counsel for the Respondents:**
C.S.C.

**Constitution of India, Article 226- Transfer on complaint of MLA-being public representative can made complaint-but genuineness of allegations subject to enquiry-without adjudging truthness of complaint-transfer-held not proper once complaint withdrawn-presumption of false complaint transfer order quashed.**

**Held: Para-5**

**In the instant case, the Authority has transferred the petitioner in public interest and has initiated an enquiry which is not a correct procedure. A prima facie case must be made out during a preliminary enquiry before issuing the transfer order, which in the instant case has not been done. The Court also find that the complaint has been withdrawn.**

(Delivered by Hon'ble Tarun Agarwala, J.)

1. The petitioner has challenged his transfer order dated 27.07.2012, by which the petitioner was transferred from Mahoba to Sonebhadra.

2. The contention of the petitioner is that the transfer was made on the basis of a complaint filed by the local MLA. It has also been stated that the local MLA subsequently withdrew his complaint, inspite of which, the petitioner has been transferred in public interest. The learned counsel for the petitioner submitted that the transfer order was not in public interest, but was politically motivated.

3. Paragraph-5 of the counter affidavit reveals that based on a complaint made by the local MLA, an enquiry was instituted against the petitioner and, pending enquiry, the petitioner has been transferred in public interest. The Respondents further submits that the enquiry is still pending, and even though, the complaint has been withdrawn by the MLA, it would not be in public interest to transfer the petitioner back during the pendency of the enquiry.

4. Having heard the learned counsel for the parties, the Court is of the opinion that the mere fact, a complaint has been made by the MLA against the petitioner does not by itself vitiates the transfer order. It is the duty of the representative of the people to express the grievances of the people and place it before the Authority concerned. However, merely because a complaint has been made by an MLA does not mean that the Authority would blindly follow the said complaint and transfer the incumbent. The complaint of the MLA is required to be looked into, for which purpose, a preliminary enquiry must be held. The Authority must find out as to whether there is any truth in the complaint levelled by the MLA and only thereafter, issue a transfer order either in public interest or on administrative ground.

5. In the instant case, the Authority has transferred the petitioner in public interest and has initiated an enquiry which

is not a correct procedure. A prima facie case must be made out during a preliminary enquiry before issuing the transfer order, which in the instant case has not been done. The Court also find that the complaint has been withdrawn.

6. In the light of the aforesaid, the Court is of the opinion that the transfer order was passed on a false complaint on which, no preliminary enquiry was made. Consequently, the transfer order can not be sustained and is quashed.

7. The writ petition is allowed.

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**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 19.10.2012**

**BEFORE**
**THE HON'BLE RAN VIJAI SINGH, J.**

Civil Misc. Writ Petition No. 54502 of 2012

**Parbhu and another ...Petitioners**
**Versus**
**D.D.C. and others ...Respondents**

**Counsel for the Petitioner:**
Sri Markandey Upadhyay
Sri Rishi Kant Rai
Sri Rakesh Pandey

**Counsel for the Respondents:**
C.S.C.
Sri A.K. Malviya
Sri Indra Raj Singh
Sri Ravindra Prasad
Sri Y.K.Singh
Sri R.D. Singh

**U.P. Consolidation of Holdings Act 1953, Section 53 (b)-applicability of provisions of section 5 of limitation Act-if appeal or revision filed beyond time-general principle consonance with provision of Order 41 Rule 3-A-same analogy should be followed-order passed on merit without deciding delay condonation-held-faulty not sustainable.**

**Held: Para-14**

**Here in this case, admittedly, the revision was filed along with an application for condonation of delay and without condoning the delay, the revision has been decided, therefore the Deputy Director of Consolidation has erred in deciding the revision on merit without condoning the delay and the impugned order dated 4.10.2012 passed by him cannot be sustained, hence, it is hereby quashed.**

**Case Law discussed:**
2008 14 SCC 445; 2005 Volume 4 SCC 613; 2001 (9) SCC 717

(Delivered by Hon'ble Ran Vijai Singh, J.)

1. Supplementary affidavit filed today, is taken on record.

2. Heard Sri Rakesh Pandey along with Sri Rishi Kant Rai, learned counsel for the petitioners, Sri K.R.Sirohi, learned Senior Counsel assisted by Sri Yogesh Kumar Singh, learned counsel for respondents no. 2 to 5 and Sri R.D.Singh, learned counsel for respondents no. 6 to 9.

3. Through this writ petition, the petitioners have prayed for issuing a writ of certiorari quashing the order dated 4.10.2012 passed by Deputy Director of Consolidation, Ghazipur in Revision No. 1210 (Naresh Vs/. Mukhram), Revision No. 1297 (Mukhram Vs. Prabhu) and Revision No. 1298 (Surendra Vs. Prabhu).

4. Sri Rakesh Pandey along with Sri Rishi Kant Rai, learned counsel for the petitioners contends that the Revisions No. 1297 and 1298 were barred by time and there were also applications for condonation

of delay but without issuing notice and without condoning the delay, revisions have been entertained and impugned order has been passed. In the submission of learned counsel for the petitioners, unless the delay is condoned, there could be no revision and the Deputy Director of Consolidation has erred in allowing the revisions.

5. On a specific query made by the Court, from the learned counsel for the respondents, as to whether the submission of Sri Pandey is correct or incorrect, it has been stated that it appears, delay has not been condoned and the revision has been allowed.

6. The counsel for both the parties agreed for disposal of the writ petition, without any further exchange of affidavits, only on the basis of legal points involved in this case.

7. For appreciating the controversy involved in this case, it has to be seen as to whether, without condoning the delay, the revision could be allowed. Section 53 (b) of the U.P. Consolidation of Holdings Act, 1953, (hereinafter referred to as 'the Act') which was brought in the Statute vide U.P. Act No. 38 of 1958, provides that the provision of section 5 of the Limitation Act, 1963 shall apply to the applications, appeals, revisions and other proceedings under the Act or the Rules made thereunder.

8. Here in this case, the revisions were accompanied with applications under section 5 of the Limitation Act, for extending the period of limitation in preferring the revisions. Section 3 of the Limitation Act provides bar of limitation subject to provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence. Meaning thereby, if the limitation has been provided for approaching the Court and that period has expired, in that circumstance, section 5 of the Limitation Act will to rescue of those who approaches the Court after expiry of the period of limitation, by making an application under Section 5 of the Limitation Act for extending the period of limitation or to condone the delay in approaching the Court. Once an application is filed for condonation of delay extending the period of limitation, then general principles has to be followed in consonance with the provisions contained under Order 41 Rule 3A of the Code of Civil Procedure, wherein it is provided that if the appeal is filed beyond the period of limitation, then it has to be accompanied with an application for condonation of delay and the Court dealing with such matter can reject the application if the delay is not satisfactorily explained and in case the Court finds that there is some substance, then, in that eventuality, notice has to be issued to otherside for having his version for disposal of section 5 application and in no case, without issuing notice and without condoning the delay, the appeal can be decided. Although, in the Act, the provisions of Order 41, Rule 3-A of C.P.C. are not made applicable but I am of the view that the same analogy should be adopted here also.

9. Here in this case, admittedly, the revision was barred by time and it was accompanied with an application for condonation of delay, therefore, unless the delay was condoned, the revisions could not have been decided on merit as in the eye of law, unless the delay is condoned, there could be no revision.

10. The view taken by me finds support from the decision of the apex Court in ***Noharlal Verma Vs. District Cooperative Central Bank Ltd. Jagdalpur*** **2008 14 SCC 445,** where the Apex Court has held as under :-

*" 32. Now, limitation goes to the root of the matter. If a suit, appeal or application is barred by limitation a court or an adjudicating authority has no jurisdiction, power or authority to entertain such suit, appeal or application and to decide it on merits.*

*33. Sub Section (1) of Section 3 of the Limitation Act, 1963 reads as under:*

*" 3. Bar of Limitation.- (1) Subject to the provisions contained in Sections 4 to 24 (inclusive) every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not be set up as a defence."*

*Bare reading of the aforesaid provision leaves no room for doubt that if a suit is instituted, appeal is preferred or application is made after the prescribed period, it has to be dismissed even though no such plea has been raised or defence has been set up. In other words, even in the absence of such plea by the defendant, respondent or opponent, the court or authority must dismiss such suit, appeal or application, if it is satisfied that the suit, appeal or application is barred by limitation."*

11. In ***V.M. Salgaocar and Bros. Vs. Board of Trustees of Port of Mormugao and another*** **2005 Volume 4 SCC 613**, following observation has been made by the Apex Court.

*20 " The mandate of Section 3 of the Limitation Act is that it is the duty of the court to dismiss any suit instituted after the prescribed period of limitation irrespective of the fact that limitation has not been set up as a defence. If a suit is ex facie barred by the law of limitation, a court has no choice but to dismiss the same even if the defendant intentionally has not raised the plea of limitation."*

12. In the case of ***Sneh Gupta Vs. Devi Sarup and others,*** (2009)6 SCC 194, in paragraph 70, the Apex Court has held that in absence of any application for condonation of delay, the court has no jurisdiction in terms of S. 3, Limitation Act, 1963 to entertain the application filed for setting aside of decree after expiry of period of limitation.

13. In ***2001 (9) SCC 717, Ragho Singh Vs. Mohan Singh,*** the Apex Court has held as under:-

(6) *" We have heard learned counsel for the parties. Since it is not disputed that the appeal filed before the Additional Collector was beyond time by 10 days and an application under Section 5 of the Limitation Act was not filed for condonation of delay, there was no jurisdiction in the Additional Collector to allow that appeal. The appeal was liable to be dismissed on the ground of limitation. The Board of Revenue before which the question of limitation was agitated was of the view that though an application for condonation of delay was not filed, the delay shall be deemed to have been condoned. This is patently erroneous. In this situation, the High Court was right in setting aside the judgment of the Additional Collector as also of the Board of Revenue. We find no*

*infirmity in the impugned judgment. The appeal is dismissed. No costs."*

14. In view of foregoing discussions, the controversy can be summarized as under:-

(i) When the statute provides limitation for approaching the Court and a person approaches the Court after the expiry of the period of limitation, then he has to approach the Court along with an application under Section 5 of the Limitation Act praying extension of period of limitation or to condone the delay in approaching the Court.

(ii) Once the application under Section 5 of the Limitation Act is filed and unless the delay is condoned, no order can be passed on merit .

(iii) The delay cannot be condoned without having the version of otherside and for that, otherside is required to be noticed and heard.

15. Here in this case, admittedly, the revision was filed along with an application for condonation of delay and without condoning the delay, the revision has been decided, therefore the Deputy Director of Consolidation has erred in deciding the revision on merit without condoning the delay and the impugned order dated 4.10.2012 passed by him cannot be sustained, hence, it is hereby quashed.

16. The writ petition succeeds and is allowed.

17. The Deputy Director of Consolidation is directed to consider the applications for condonation of delay first and in case the delay is condoned, the revisions itself be decided expeditiously, but not later than six months from the date of decision on section 5 applications. In case the application under section 5 is rejected, the reason for the same may also be recorded.

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**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 27.11.2012**

**BEFORE**
**THE HON'BLE SATYA POOT MEHROTRA, J.**
**THE HON'BLE HET SINGH YADAV, J.**

Civil Misc. Writ Petition No. 61462 of 2012

**Purushottam Ram ...Petitioner**
**Versus**
**State of U.P. and others ...Respondents**

**Counsel for the Petitioner:**
Sri Sunil Kumar Singh
Sri Rajesh Kumar Singh

**Counsel for the Respondents:**
Sri Vivek Verma
C.S.C.

**Constitution of India, Article 226-revision-against order-passed by Development Authority under Section 27 of Urban Development Act-despite of pending revision notices to remove construction-stay application could not be considered as presiding revision authority not posted-petition disposed of with direction to approach before R-2-who shall consider and take appropriate decision-Status Quo-be maintained-till disposal of revision.**

(Delivered by Hon'ble Satya Poot Mehrotra, J.)

1. The present Writ Petition has been filed by the petitioner, inter-alia, praying for directing the respondent no.2 to expeditiously dispose of the Stay Application filed by the petitioner along

with the Revision No. 82 of 2012 filed by him.

2. It appears that an order dated 14.9.2009 was passed by the concerned Officer of Varanasi Development Authority exercising power under Section 27(1) of the U.P. Urban Planning and Development Act, 1973 , inter-alia, directing for demolition of the construction in question raised by the petitioner.

3. Thereupon, the petitioner filed an Appeal under Section 27 (2) of the said Act.

4. The said Appeal was dismissed by the Commissioner/ Chairman, Varanasi Development Authority by the order dated 26.7.2012.

5. Thereafter, the petitioner filed a Revision before the State Government under Section 41 (3) of the said Act. The said Revision was numbered as Revision No. 82 of 2012.

6. The said Revision is stated to be pending before the respondent no.2.

7. It further transpires that Stay Application has been filed on behalf of the petitioner alongwith the said Revision. Copy of the said Stay Application appears at page no. 67 of the Paper -Book of the said Writ Petition .

8. It is further averred in the Writ Petition that despite the pendency of the said Revision, a notice dated 7.11.2012 has been issued by Varanasi Development Authority directing the petitioner to remove the construction in question.

9. We have heard Sri Rajesh Kumar Singh, learned counsel for the petitioner, Sri Vivek Verma, learned counsel for the respondent nos. 3 , 4 and 5 and the learned Standing Counsel appearing for the respondent nos. 1 and 2, and perused the record.

10. In paragraph no. 18 of the Writ Petition, it has been stated that the post of Principal Secretary, Housing nd Urban Planning , Government of U.P., is vacant , therefore, the Revision preferred by the petitioner is not being proceeded with .

11. In view of the above avernment made in paragraph no.18 of the Writ Petition, learned Standing Counsel appearing for the respondent nos. 1 and 2 was directed to be obtain instructions in the matter.

12. Sri K.R.Singh, learned Standing Counsel appearing for the respondent nos. 1 and 2, on the basis of instructions received by him, states that Sri Praveer Kumar is looking after the work of the Principal Secretary . Department of Housing and Urban Planing , Government of U.P. , Lucknow , and he will deal with the Revision filed by the petitioner.

13. In view of the above, we are of the view that the interest of justice would be subserved by disposing of the Writ Petition with the following directions:

1. Within six weeks from today, the petitioner will file an Application before the respondent no.2 alongwith certified copy of this order as well as copy of the aforesaid Revision filed by the petitioner.

2. On receipt of the aforesaid Application alongwith the documents

mentioned above, the respondent no.2 will proceed to consider the Stay Application filed with the Revision preferred by the petitioner and will pass suitable orders thereon in accordance with law, expeditiously ,preferably within a period of two months of the receipt of the aforesaid Application, after hearing the petitioner and by passing speaking order. .

3. Till 18,.3.2013 or till the disposal of the Stay Application, filed by the petitioner with the Revision , by the respondent no.2, as directed above, whichever is earlier, Status -quo , as of date, in regard to the construction in question, will be maintained by the parties hereto.

14. The Writ Petition is disposed of accordingly with the above directions.

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